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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 425

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILWAY COMPANY, WIGGINS FERRY COMPANY, *ET AL.*,
Appellants,

v.

THE UNITED STATES OF AMERICA, MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *ET AL.*,

Appeal From the District Court of the United States For the Eastern District of Missouri.

Brief for the Appellants, Terminal Railroad Association of St. Louis, St. Louis Merchants Bridge Terminal Railway Company, Wiggins Ferry Company, St. Louis Bridge Company, Henry Miller and S. D. Webster.

STATEMENT

This proceeding is the latest fruit of a litigious tree which was planted a generation ago and has since borne an abundant harvest of distraction and confusion.

During the progress of this litigation courts have been created and have been abolished, judges have come and gone and died, great wars have been fought, and the map of the world has been changed; the railroads of the country have been taken out of the hands of their owners, converted into governmental agencies and then returned under a new scheme and plan of operation; the original defendants in this case have now assumed opposite roles instead of all being defendants resisting the attack of the Government; the Government has long ago dropped out since the public interests are not involved, and the present field of battle is now cleared for the internecine strife between the various Proprietary Lines which own and control these Terminal properties.

The original action was commenced in 1905 by United States District Attorney Dyer at the direction of the Attorney General of the United States predicated on a violation of the Sherman Anti-Trust Act of July 2, 1890, and charged that the defendant railroad companies, hereinafter called Proprietary Lines, as owners of the stock of the defendants, Terminal Railroad Association of St. Louis, St. Louis Merchants Bridge Terminal Railway Company, Wiggins Ferry Company, and their subsidiaries, hereinafter called Terminal Companies, together with the defendants' officers and directors, were monopolizing and unreasonably restraining interstate commerce between the States of Missouri, Illinois and other states and foreign countries. (Rec. 3.)

The gist of the cause of action, and as specifically summarized in the complaint, is that "the fourteen above named railroad companies which own and con-

trol the capital stock of the Terminal Association, acting through said Terminal Association, controls and owns and operates the Eads and Merchants Bridges, crossing the Mississippi River at St. Louis, Missouri, the Wiggins Ferry Company, with its ferry boats and railroad tracks on either side of the Mississippi River, the Terminal Railway Company of St. Louis, the Terminal Railroad Association of St. Louis, the St. Louis Merchants Bridge Terminal Railway Company, as well as all of the issued and outstanding stock of the Terminal Railroad Company of East St. Louis, Illinois, and all of the issued and outstanding capital stock of the Union Railway & Transit Company of Illinois, and all of the authorized and issued stock of the East St. Louis Belt Railway Company, and also owns and operates and controls the East St. Louis & Carondelet Railroad Company, the Granite City and Madison Belt Railroad Company, the Tunnel Railroad Company of St. Louis, the Madison, Illinois & St. Louis Railway, the St. Louis Transfer Railway Company, the Wiggins Car Transfer Company, the East St. Louis Terminal Railroad Company, the East St. Louis Connecting Railway Company, the Illinois Transfer Railway Company and the St. Louis Belt & Terminal Railway Company, comprising in all about one hundred and fifty miles of railroad.

That by reason of the facts hereinbefore set out, said fourteen railroad companies above named, through their agent and representative (the Terminal Railroad Association of St. Louis), all use the property of said Terminal Railroad Association for interstate business between Illinois and Missouri, and compel all other railroad companies which are not owners of stock in said Terminal Association to

use the said property of the Terminal Association for interstate commerce business between Illinois and Missouri, and between said two states and the other states of the United States and foreign countries, and that said fourteen railroads, acting through the Terminal Association as aforesaid, jointly and arbitrarily fix unreasonable charges and tolls to be paid for freight and passengers to be hauled and transferred in the interstate business between Illinois and Missouri, and between said states and the several states of the United States and foreign countries, and by means of said joint control by the said fourteen railroad companies all competition is stifled and destroyed.

That unless the complainant prevents the continued existence and carrying out of the combination and conspiracy to unreasonably and unlawfully restrain commerce among the several states and foreign countries, as aforesaid, the monopoly of the interstate and foreign commerce as carried on as aforesaid by said defendants between the said states of Missouri and Illinois, and said several states of the United States, and of foreign countries, will be perpetuated, and the public greatly injured and damaged, and the act of Congress of July 2, 1890, to protect trade and commerce, will be circumvented and set at naught, and the public be left at the mercy of a monopoly thus created through the combination of the fourteen railroad corporations jointly owning and operating the Terminal Railroad Association of St. Louis.

That the properties hereinbefore enumerated as instruments of interstate commerce are so operated by the said Terminal Railroad Association of St. Louis (owned and controlled as aforesaid by the said four-

teen railroad companies, owning and controlling the stock of said Terminal Association), as to constitute a monopoly in their employment and conduct as aforesaid of all interstate commerce between the states of Illinois and Missouri, and the various states of the United States and foreign countries, and so as to exclude from participation therein in all interstate commerce on the part of carriers of freight and passengers, all others than those named herein as parties to the unlawful combination and conspiracy hereinbefore set forth." (Rec. 18-19.)

The defendants admitted that the three terminal systems were brought together in 1902 under the control of the defendant railway companies, but contended that each of the three terminal systems was incomplete in itself so that it was in furtherance, rather than in restraint, of interstate commerce that these terminal systems jointly operate in order that the terminal functions for which they were organized might be more efficiently and economically performed.

The Attorney General of the United States filed a certificate under the Expedition Act of February 11, 1903, and the case was finally heard before Sanborn, Van Devanter, Hook and Adams, the four Circuit Judges of this Circuit. (Rec. 25.)

The bill was dismissed by a divided Court since "two of the judges of this Court were of the opinion that complainant should prevail and two of the judges of this Court were of the opinion that the defendants should prevail." (Rec. 35.)

Upon an appeal to this Court the decree of dismissal was reversed in an opinion delivered by Mr. Justice Lurton on April 22, 1912. (224 U. S., 383.) (Rec. 36.)

When the mandate was filed in the District Court, which had supplanted the United States Circuit Court, the Government requested the District Court, Judge Dyer presiding, for entry of a preliminary order requiring the defendants to submit a plan of reorganization within ninety days.

Counsel for the defendants suggested the impropriety of Judge Dyer acting in the matter since he had been of counsel for the Government and had filed the original bill of complaint as District Attorney, and counsel for the defendants "presented the question whether any further action taken in the case should not be had by the Circuit Judges, the case having been sent to them under the Expediting Act of Congress for trial." (Memorandum decision of Judge Sanborn, Rec. 54.)

Judge Dyer disqualified himself, but at the insistence of the Government assigned the hearing upon the mandate to Judge Trieber of the Arkansas District Court, and he entered an order requiring the defendants, on or before ninety days thereafter, to submit to the Court a plan of reorganization. Such a plan was timely submitted to Judge Trieber pursuant to the mandate and decision of the Supreme Court, and was approved by Judge Trieber. Although the Government had originally insisted that the hearing be had before a District Judge rather than the four Circuit Judges now finding Judge Trieber's decision unsatisfactory, filed with him a suggestion that the matter should be heard and determined by the Circuit Judges. This suggestion was overruled by Judge Trieber, whereupon the Government, after an unsuccessful effort to obtain a hearing before the Circuit Judges, applied and obtained from this Court

a writ of prohibition, this Court holding, in an opinion delivered by Mr. Chief Justice White on January 6, 1913, 226 U. S., 422, that a decree on the mandate could not be entered by a single Judge, but only by at least three Circuit Judges in conformity to the Expedition Act. (Rec. 55.)

In the meanwhile Judge Adams had died, Mr. Justice Van Devanter had become a member of this Court, Judge Smith had become a Circuit Judge, and a hearing on the mandate was had before the three Circuit Judges, Sanborn, Hook and Smith. These judges were unable to agree and an interlocutory decree on the mandate, signed only by Judges Sanborn and Smith, was entered on June 16, 1913, as follows:

> "This cause came on to be heard at this term on the motion of the United States that an interlocutory decree be entered pursuant to the opinions of the Supreme Court reported in 224 U. S. 382, 411 and 226 U. S., 420. The United States of America, complainant, heretofore appealed to the Supreme Court of the United States from the final decree of this court dismissing this cause on June 8, 1910, and the Supreme Court of the United States at its October Term, 1911, having heard the appeal upon a transcript of the record and having thereupon, on the 22d day of April, 1912, ordered, adjudged and decreed that the said decree of this court in this cause be reversed and that said cause be remanded to this court for further proceedings in accordance with the mandate of the Supreme Court in this cause bearing date May 23, 1912, which was recorded in this court on June 3, 1912. The Honorable Jacob Trieber, United States District Judge, on June 11, 1912, entered an interlocutory decree pursuant to the mandate, but subsequently, on the petition for a writ of prohibition the

Supreme Court of the United States rendered a decision to the effect that he was without jurisdiction to render such decree and that this case could be considered and determined only by a court composed of Circuit Judges in accordance with the provisions of the Expedition Act, Chap. 544, 32 Stat. 823.

"Now, therefore, in obedience to the mandate of the Supreme Court and in accordance with the opinions of that Court, to which reference has been made, it is hereby ordered, adjudged and decreed that the interlocutory decree hereinbefore rendered on June 11, 1912, by the Honorable Jacob Trieber, District Judge, be, and the same is hereby, set aside and for naught held pursuant to the opinion of the Supreme Court; that within sixty days after the entry of this decree the Terminal Railroad Association of St. Louis and the fourteen railroad companies defendants herein, their successors and assigns, if any, and such other companies as may have become co-members with the fourteen defendant railroad companies, if any, shall submit to this Court a plan, upon which the defendant herein shall have agreed, for reorganization of the contracts, agreements, arrangements and leases, and the use and operation of the properties and terminal facilities of the defendants herein, between the Terminal Railroad Association of St. Louis, Missouri, and its fourteen co-defendant railroads, as aforesaid, as will make said contracts conform in all respects to the terms and conditions hereinafter mentioned.

"First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company on a plane of equality in respect of benefits and burdens with the present proprietary companies.

"Second. Such plan or reorganization must also

provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company as nearly on an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

"Third. By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

"Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis or to points beyond.

"Fifth, By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating in the so-called one hundred mile area, that is not equally or in like manner applied in respect of all other traffic of like character originating outside of that area.

"Sixth. By providing that any disagreement between any company applying to become a joint owner or user as herein provided for and the Terminal or proprietary companies which shall arise after a final decree in this cause, may be submitted to this court upon a petition filed in this cause, subject to review by appeal in the usual manner.

"Seventh. It is further Ordered, Adjudged and Decreed that the said parties also present at the same time a proposed form of final decree in accordance with the directions of the Supreme Court in its mandate and opinion, which shall contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission

over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint rates or routes over its lines, or any other power conferred by law upon such commission.

"Eighth. Upon the failure of the parties defendant to come to an agreement within sixty days from the entry of this decree which is in substantial accord herewith, the Court will, after hearing the parties to this cause, upon a plan for the dissolution of the combination between Terminal Company, the Wiggins Ferry Company, the Merchants' Bridge Company, and the several Terminal Companies related to the Ferry and Merchants' Bridge Company, make such order and decree for the complete disjoinder of the three systems, as may be necessary, enjoining the defendants, singly or collectively, from any exercise of control or dominion over either of the said terminal systems, or their related constituent companies, through lease, purchase or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly or from any future combination of the said systems in evasion of such decree or any part thereof." (Rec. 58-60.)

Judge Sanborn filed a memorandum opinion holding that the interlocutory decree gave effect to the mandate and that a hearing on the merits should be had before a final decree should be entered either accepting or rejecting the proposal of the Government to incorporate into the decree the control or supervision of the alleged arbitrary charges made by the Terminal Companies. Judge Sanborn's opinion is as follows:

"The United States moves the Court to enter the preliminary decree in this case specified in the opinion of the Supreme Court in 224 U. S. 410, to the effect that the defendants present for

the consideration of this Court a proposed reorganized contract and final decree. We agree and shall insist that the true intent and meaning of the direction of the Supreme Court that 'any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one-hundred-mile area that is not equally and in like manner applied in respect of all other traffic of like character originating outside of that area,' shall be abolished and of every other direction of that Court in its opinion and mandate in this case must be carried into complete effect by the new contract and the final decree. In our opinion the interlocutory decree now to be entered as clearly so directs as does the opinion and mandate of the Supreme Court.

"The question presented by the motion now in hand is not what the final decree shall be, nor by what terms the abolition of the so-called arbitrary shall be effected. Counsel for the respective parties do not agree regarding the present existence of the character of this so-called arbitrary, nor upon the provisions of the final decree by which it should be abolished, and they ask a full hearing upon these questions before they are decided and before the terms of the contract and final decree are settled. Counsel for the United States in their last brief state that the government submits it 'with the understanding that the final decree is not now under consideration' and 'requests that it be given an opportunity to be heard upon the question of what the final decree shall contain.'

"We are of the opinion that this request should be granted, that, after a proposed contract and final decree are submitted to this Court, pursuant to the interlocutory decree and before the crucial issues now pending are decided, and before we form or express our final opinion concerning them, counsel for the parties should be heard

upon them after they know that the hearing is not preliminary, but final. Hence we decline to enter upon a discussion or decision of the merits of the main issues now remaining in this case, and, except as stated above, and in the interlocutory decree, we decline either to adopt or to repudiate the views attributed to us by our learned associate, Judge Hook. Indeed, we endeavor, and shall endeavor until after the final hearing upon the terms of the contract and of the final decree, to keep our minds open and to avoid the formation or expression of our opinion upon these issues because this case is here now on a mere motion to enter the preliminary decree directed by the Supreme Court to the effect that 'the parties submit to the Court within ninety days after receipt of the mandate, a plan of reorganization of the contract between the fourteen defendant railroad companies and the Terminal Association,' which is required to contain the six provisions specified in the interlocutory decree filed herewith, and that decree in our judgment completely effectuates the direction of that Court regarding this preliminary decree. It will be early enough to consider and determine the terms and provisions of the proposed contract and of the final decree when they have been presented for our consideration and after final hearing of the parties have been submitted to us for decision." (Rec. 60-61.)

Judge Hook refused to sign the interlocutory decree, but filed a dissenting memorandum opinion in which he accepted the theory then advanced by the Government that the Terminal Companies were not common carriers and, therefore, could not make any lawful charge for their services so that traffic originating within a hundred miles of St. Louis and East St. Louis should be hauled by the Proprietary Lines and the Terminal Companies from the nearby terri-

tory in Illinois to St. Louis and East St. Louis at the same rate. Judge Hook's opinion is as follows:

> "A difference has arisen between my brothers and myself over the meaning of the opinion and mandate of the Supreme Court in this case. It comes in this way: On February 25, 1913, the Government filed and presented to us two motions. The first to vacate an order of September 3, 1912, declining, by an equal division of the Circuit Judges, to take further cognizance of the case, the Supreme Court having subsequently held that the jurisdiction of those judges still continued and should be exercised. The other was entitled 'Motion for filing of mandate and entry of interlocutory decree.' This is the motion which presents the matters now before us. The Government tendered with the motion a form of interlocutory decree, which it asked us to adopt and enter, enjoining the defendants from continuing to impose certain special charges as being wrongful and contrary to the decision of the Supreme Court (224 U. S. 383). At the hearing of the motion defendants insisted that a form previously approved by the District Judge (without jurisdiction, 226 U. S. 420) was the proper one. It contained no injunction, left the defendants free to continue their practice, and remitted the matter in general terms to a subsequent modification of the contracts between the defendants. The Government earnestly objected to that form of interlocutory decree as insufficient to give the relief the Supreme Court intended it should have. There was an exhaustive discussion in open court involving the interlocutory decree proposed by the Government, the meaning of the opinion of the Supreme Court, whether what defendants were still doing was contrary to the opinion and if so should be enjoined by the interlocutory decree, or on the other hand should be merely abolished by sub-

sequent contract between the defendants. At the conclusion of the arguments we made an order of which the following is the pertinent part, the bold face being mine:

"'And the said complainant further files and presents to the court a motion to vacate the order entered herein on September 3d, 1912, together with a motion for the filing of the mandate of the Supreme Court **and for the entry of the interlocutory decree in the form now tendered**; whereupon the court after hearing the arguments of counsel for the respective parties doth order that the said defendants be and they are hereby allowed five days from this date **to file any objections and brief in opposition to the said form of interlocutory decree**, and that the said complainant be and it is hereby allowed five days thereafter for reply thereunto; whereupon **the said motions shall be taken as submitted to the court.**'

"The briefs furnished under this order also contain a full discussion, particularly as to whether the continued practice of defendants had been condemned by the Supreme Court and should be enjoined. As will be shown presently, counsel for defendants openly and candidly stated in their brief what they were still doing, but contended it was consistent with the opinion of the Supreme Court. The Government contended in its brief that the practice was condemned by the opinion and that the interlocutory decree it proposed was drawn on that theory. I do not think I am mistaken in saying that my brothers sustain defendants in their contention. Their view is not fully expressed, but it is foreshadowed in the interlocutory decree about to be entered. That decree is substantially in the form of one entered by the District Judge which we vacated. It contains no injunction or award of the relief against the continued imposition of the special rates and charges sought by the Government in its proposed form of interlocutory decree.

"I therefore deem it proper and timely to put upon the record what I think the Supreme Court said and intended and a recital of what the defendants are still doing. It is not premature. It is in response to the motion of the Government submitted to us after full argument. I know of no request that our decision be delayed for further argument at final decree. Certainly nothing of the kind appears in the briefs on file. This matter should not be confused with the plan hereafter to be submitted to us for reorganizing the combination of the defendants and reforming the contracts among themselves. That is for the final decree and there is little disagreement and no difficulty about it. When counsel for the Government, by way of precaution, said in their brief that the final decree was not under consideration and that they wished an opportunity to be heard upon its contents, they were addressing themselves to a statement of opposing counsel that the District Judge intended to enter a final decree which would be 'merely in effect a recital of the order of the Supreme Court.' They were not asking that our decision upon their motion and the injunctive provisions of the interlocutory decree so fully presented and argued, be postponed for a further argument. They cannot reasonably be put in that position. The question of injunction is up for decision now. The combination known as the Terminal Association is still acting as a terminal agency. The Supreme Court holds that while doing so certain special or arbitrary charges cannot lawfully be made. If what defendants admit is still being done is wrong, it is wrong now; and the Government is entitled to an injunction at this time and to know definitely just what is enjoined. An injunction is a very proper function of an interlocutory decree when, as here, the facts are admitted and the law has been finally and authoritatively settled by the court of last resort. Nor

does it make against this that the injunction may also be carried into a final decree subsequently to be entered. So I say again a decision having been invoked is both timely and proper. If I have misapprehended the position of my brothers what I shall say will at least serve the parties as a guide, in preparing the final decree, in respect of those things already presented, argued and submitted, but passed by. I will not discuss or prejudge any disputed question about the 'plan of reorganization' to be submitted and determined at final decree. Reference thereto will be made only so far as there is no controversy and to illustrate those matters which I think should be settled now. Within the above limits the following conclusions from the opinion of the Supreme Court seem clear:

"1. The Terminal Railroad Association of St. Louis is a combination prohibited by the Sherman Anti-trust Act if its constituents (the various bridge and terminal companies) are to be regarded as transportation companies or are operated as such.

"2. The Association may be upheld, however, as a lawful unification of terminal facilities (as distinguished from ordinary transportation railroads) upon (a) certain modifications of the articles of agreement with the proprietary railroad companies, and (b) stopping certain administrative practices. These conclusions of the Supreme Court were due in substantial measure to the exceptional topographical situation at St. Louis and vicinity and they would not necessarily apply elsewhere. Cases elsewhere are not necessarily precedents here.

"3. The articles of agreement are to be so modified that any existing or future railroad may be admitted to joint ownership or control of the combined terminal properties upon just and reasonable terms securing equality in benefits and burdens with the present proprietary companies; to

allow the use of the facilities upon just and reasonable terms and regulations by any railroad not desiring to become a joint owner; and to eliminate from the agreement any provision restricting the proprietary companies to the use of those facilities. And provision is to be made for the submission to this court of certain controversies growing out of the foregoing. Compliance with the above requires merely the contractual action of the defendants.

"4. The opinion of the Supreme Court also requires 'an inhibition of certain methods of administration.' Obviously, in this as in all cases of like character, the inhibition of wrongful practices should be by injunctive decree and not left to rest solely upon stipulations in a contract. The wrongful practices of defendants pointed out by the Supreme Court were directed against the public, not parties to the contract, and it would be quite anomalous if upon a showing in the future that defendants were persisting in them the court should be without punitive power, but could merely declare a breach of contract. As to these I think the opinion of the Supreme Court means that an injunction should be awarded. As the facts are admitted and the law settled the injunction when asked should be granted and not postponed to final decree.

"5. The practices referred to are described in the fourth and fifth paragraphs of the directions for a decree set forth in the opinion as follows:

"Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

"Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area

that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

"The principal difference between my brothers and myself, as well as between counsel, is over the meaning of the last of these paragraphs. I think that when read, as it should be, in the light of the entire opinion and the record in the case the meaning is quite clear. But whoever is right I take it as highly desirable that the prohibition be expressed in the decree with such detail gathered from the opinion and record that no doubt can reasonably be entertained of its scope and purport. This is especially important in a case of injunction, a violation of which may be followed by punishment; or if it be not done, then that the decree be accompanied by an opinion indicating definitely the attitude of this court to the end that the parties may conduct themselves accordingly. To put the precise words of the fifth paragraph in the decree without more, as is proposed, does not end the case, but establishes a starting point for further controversy and litigation.

"7. In considering the fifth paragraph it should be borne in mind that the Supreme Court holds that the Terminal Association can lawfully operate only as a terminal agency of the various carrying railroads. As such it may make the usual charges for terminal services like switching and warehousing, but it cannot lawfully interpose itself as a transportation company between western roads in St. Louis, Missouri, and the eastern roads in East St. Louis, Illinois, and make charges for service of that character. It logically results from this that the two cities (and certain towns to which for brevity no further reference need be made) constitute one commercial and manufacturing center connected and served by an aggregation of terminal facilities in which all the railroads are or may be interested and which all may

use. As regards transportation rates the several localities of this industrial center should be upon a parity without discrimination, arbitrary or differential; otherwise the Association becomes at once an unlawful combination of carrying railroads. The prohibition in the fourth paragraph of the practice of requiring shippers to rebill at East St. Louis the traffic destined to St. Louis or beyond is in line with this view; also the court's references to the exceptional physical situation in that locality. The testimony before the Supreme Court discloses the conditions to which the fifth paragraph is directed. It shows that no distinction was being made between St. Louis and East St. Louis in respect of rates on traffic originating or destined outside of an irregular area about those cities having a radius of approximately one hundred miles. In respect of those rates the cities were one. Mr. Perkins, the witness referred to in the opinion, said by way of example: 'A shipment coming from say Kansas City to St. Louis has the same rate as a shipment coming from Kansas City to East St. Louis.' He also said the two cities were on a parity as regards rates on west-bound shipments from points outside the area referred to. But the situation was entirely different as to rates on traffic originating and ending within the limited area. Concerning these Mr. Perkins testified as follows:

" 'But the basis of rates between St. Louis and points within the one hundred mile radius east of here, is higher than between East St. Louis and those points, taken by itself. The basis of rates between East St. Louis and the points within one hundred miles west of here is higher than the basis of rates between St. Louis and points west of here.'

"The report of the Municipal Bridge and Terminal Commission to the Municipal Assembly of St. Louis on February 11, 1908, contains this paragraph:

"'In the report of May 24, 1907, reference was made to an arrangement perfected at a meeting between the executive traffic officers of Eastern Lines and your Commission, on April 19, 1907, for the removal of the last of the bridge arbitrary differentials on business between St. Louis and points beyond a 100 mile radius. That arrangement has now been carried out.'

"In view of some contentions of defendants' counsel which will be presently mentioned three things about the above excerpt may be noted: First, the charge in question is referred to as a 'bridge arbitrary differential;' second, the charge was removed from business outside the 100 mile radius; and third, the removal was effected by arrangements with 'Eastern Lines,' not with the Terminal Association. Counsel assert the right of defendants to continue within the 100 mile area the additional charge as between the two cities which was removed outside, and in this as I understand it, they are upheld by my brothers. Counsel for defendants say in their brief:

"'We understand it to be true that the railroad companies, parties to the case, make a higher charge for St. Louis than East St. Louis on some traffic originating within the so-called one hundred mile area. There is a zone beyond the one hundred mile area, in which the entire charge for the use of terminal facilities of the Terminal Association is absorbed in the through railroad rates, making the East St. Louis rate applicable to industries on the Terminal Association and railroads in St. Louis.'

"They contend this was not what the Supreme Court had in mind, but since the record shows no other existing condition to which the fifth paragraph could apply they are driven to the suggestion that the Supreme Court labored under a misapprehension because the charge now made is not an arbitrary and is not imposed by the Terminal Association but by the railroads.

It is not important what this charge for transportation across the river between St. Louis and East St. Louis may be called. In the testimony it was referred to interchangeably as an arbitrary, a differential and a special charge. The Supreme Court referred to it as a 'special or so-called arbitrary charge.' Mr. Perkins said: 'It makes no difference whether you call it arbitrary or differential, or what, it is an amount paid.' And as we have seen the Terminal's Commission referred to like charges on traffic coming from or destined outside the area as 'bridge arbitrary differentials.' It is equally unimportant that instead of being imposed by the Terminal Association as was once the case it is now being added by the proprietary railroads to their freight rates. In either case it is not a terminal switching charge, but is a transportation charge as to which the two cities are not upon a parity. The combination of terminal facilities at St. Louis cannot lawfully operate or be operated as carrying railroads. The record before the Supreme Court showed clearly that when the testimony was taken the special charge was not being made as a separate, distinct item, but was added to and included in the freight rate within the 100 mile area. Mr. Perkins testified that it was still there. I think the Supreme Court was dealing with the situation so disclosed and with substance, not form. Whether imposed by the Terminal Association as an agency or by the proprietary railroads as principals the arbitrary was equally objectionable as a transportation charge and worked a burden on the commerce of St. Louis. I repeat here the direction of the Supreme Court: 'the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect to the traffic originating within the so-called one-hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.'

In applying this, effect must be given to the phrase 'equally and in like manner.'

"By the opinion and mandate the Supreme Court defined the permissible character of the Terminal Association as a combination of terminal facilities reaching and serving a common commercial and manufacturing center; directed changes in its organization to adapt it to local conditions; conceded the right to charge and collect for proper terminal services; denied the right in it or its proprietors to charge and collect transportation rates for carriage across the river as though the cities were distinct communities; and directed the inhibition of certain practices not in harmony with the above. Having so fixed the status of the parties the Interstate Commerce Commission was left free for the exercise of its jurisdiction." (Rec. 61-67.)

The cause was further heard by the three Circuit Judges, Sanborn, Hook and Smith, and on March 2, 1914, although entertaining divergent views, they signed and caused to be entered a compromise final decree as follows:

"This cause came on to be heard at this term, and it appearing that the United States of America, complainant, heretofore appealed to the Supreme Court of the United States from the final decree of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, dismissing this cause on June 6, 1910; and the Supreme Court of the United States at its October Term, 1911, having duly heard said appeal upon the transcript of the Record, and having thereupon on the 22nd day of April, 1912, ordered, adjudged and decreed that the said decree of the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri in this cause be and the same is hereby reversed,

and that said cause is remanded to this Court for further proceedings in accordance with the mandate of the Supreme Court of the United States in this cause, bearing date the twenty-third day of May, 1912.

And afterwards, to-wit, it appearing that on the 16th day of June, 1913, a preliminary decree was entered in accordance with the mandate of the Supreme Court, now, therefore, it is ordered adjudged and decreed by the Court as follows:

1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified.

An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered.

2. The Agreement of October 1, 1889, between

the Terminal Railroad Association and various other defendants, known in the record as Exhibit 'A,' shall be reformed in the following manner:

(a) The provisions thereof reading as follows shall be eliminated:

'III. In consideration of the foregoing each of the proprietary companies, for itself only and not for others, accepts the right of joint use hereinbefore granted by the first party and hereby covenants and agrees that it will forever make use of the bridge and terminal properties of the first party, as above described, for all passenger and freight traffic within its control through, to and from St. Louis and destined to cross the Mississippi River at St. Louis, and pay therefor as herein provided.'

(b) The provision thereof reading as follows shall be eliminated:

'XVII. Neither party shall sell, assign, transfer or underlet the rights and privileges hereby granted, or any of them, to any other company or companies without the unanimous consent of the Board of Directors of the first party.'

In lieu thereof the following may be inserted: 'No proprietary or using company shall sublet its rights and privileges in the use of the terminal facilities to any other company or companies.'

(c) The provision thereof reading as follows shall be eliminated:

'XIX. This agreement may be executed in counterparts, and any railroad company not named as second party hereto, may be admitted to joint use of said terminal system on unanimous consent, but not otherwise, of the directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement or any counterpart thereof thereby indicating its rights and duties in respect to use of said terminal system to be the same and

none other than the said proprietary companies named as second party hereto.'

In lieu thereof the following shall be inserted:

(1) In case any other railroad company, not named as second party hereto, shall hereafter desire to become a member of the Terminal Railroad Association of St. Louis, it may become a member thereof, with equal rights of joint ownership and control of the combined terminal properties of said Association, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens of the parties hereto of the second part.

(2) Any other railroad company not electing to become a joint owner as above provided, but desiring the use of the terminal facilities of the Terminal Railroad Association of St. Louis may enjoy the use thereof upon such just and reasonable terms and regulations, as will in respect of use, character and cost of service, place it upon as nearly an equal plane as may be, with respect to expenses and charges, as that occupied by the proprietary companies.

(3) Any dispute or controversy which shall hereafter arise between any railroad company applying for joint ownership or use of the said terminal properties and the owning, proprietary companies shall be submitted to the United States District Court for the Eastern Division of the Eastern District of Missouri, by filing a petition in this cause setting out specifically the facts upon which the said parties have disagreed and the party so filing said petition shall at least fifteen (15) days before so doing so serve the other party to the controversy with a copy of the petition proposed to be filed, together with a notice that said petition will be filed on a certain designated day. Thereupon the matter shall be placed upon the docket of the United States District Court for the Eastern Division of the Eastern

District of Missouri, and shall be heard when called in its regular order on said docket and the proceedings shall be subject to review by appeal as in any other cases. Upon being advised by the filing of a petition of such dispute or controversy the Court may at once admit the applying company to ownership or use of the terminal facilities during the pendency of the proceedings upon the giving of security in amount and form as it may direct.

(d) All provisions of the purport or effect of those eliminated from the Agreement of October 1, 1889, shall also be removed from all other contracts affecting the ownership or use of the terminal facilities to which the Terminal Railroad Association and the proprietary companies or any of them are parties. The benefits and burdens of the amended agreement shall inure to and rest upon all future proprietary and using railroad companies respectively.

3. Hereafter traffic destined to St. Louis, Missouri, or to points west of the Mississippi River and to be transported through the St. Louis gateway or traffic from St. Louis, Missouri, destined to points east of said river, shall not be billed to East St. Louis, Illinois, or other junction points or termini of the railroads of any of the said railroad companies east of the river and then rebilled to destination, but for all such trafffic each railroad company shall issue through bills of lading unless otherwise directed by the person controlling the same. The defendants are perpetually enjoined from violating the above provisions.

4. The defendants are perpetually enjoined from making any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

5. The provisions of this decree shall extend to and embrace all railroad companies now or hereafter admitted to joint ownership or use of the facilities of the Terminal Railroad Association and to all its facilities present and future acquired.

6. Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission." (Rec. 67-70.)

Judge Smith apparently felt that his position in having signed this decree ought to be explained and that he did not want to be understood as agreeing to the proposition that a Federal Court had either original or concurrent jurisdiction with the Interstate Commerce Commission to fix rates. His opinion is as follows:

"The members of the Court have entertained and now entertain divergent views as to what the decree in this case should be notwithstanding the opinion of the Supreme Court, which is our guide and which all of us are cheerfully desirous of following according to its true intent.

The foregoing decree is in the nature of a compromise of these divergent views and as such I have signed it, but I could not do this without expressing my personal opinion briefly upon the subject.

The fixing of rates for the future is a legislative and not a judicial function.

There are numerous roads which do not extend beyond the State of Illinois which terminate at East St. Louis. One of these is only eight or

ten miles long. It probably cost not to exceed three hundred thousand dollars for the entire road. It is now contended that the Supreme Court meant to hold that for whatever price this road saw fit to haul coal to East St. Louis or for whatever price might be fixed by Illinois it must haul it to St. Louis over property including bridges, right-of-way and trackage worth many millions of dollars.

I cannot reach that conclusion and chiefly because such a decree would be beyond the jurisdiction of this or any other human court even as a part of the jurisdiction of a court of equity, to award complete relief. It is distinctly a legislative function and until Congress or the Interstate Commerce Commission shall so fix the rates no judicial tribunal has any power to so decree.

2. Not only has the Interstate Commerce Commission not so decreed, but it has long held that such an order should not be made.

Commercial Club of Omaha v. C. R. I. & P. Ry. Co.;
6 Interstate Commerce Commission Rep. 647;
Act to Regulate Commerce, 405-6-7.

3. Wholly aside from both of these questions if this decree means the rate must be the same from points in Illinois to East St. Louis, Illinois, and to St. Louis, Missouri, then an intrastate and an interstate rate are indissolubly united and the State of Illinois has thus power to fix interstate rates.

It has recently been held that before State rates can be declared unconstitutional the entire intrastate business must be taken into account.

For this reason the State of Illinois could put in a non-compensatory coal rate to East St. Louis if the rates as a whole were compensatory.

There is substantially no limit the State cannot go to in reducing the rates on any given com-

modity provided the entire body of rates is compensatory.

It was held in the Minnesota Rate Cases, 230 U. S. 352, that the Interstate Commerce law did not divest the State of the power to make rates throughout its limits and so under no provision of the existing law, State or Federal, could the rate on coal from points in Illinois to East St. Louis be decreed invalid unless the entire schedule of rates was non-compensatory.

It is apparently the opinion of at least a part of the Court that this decree without legislative action ties interstate rates onto State rates so that while the United States under existing laws cannot control State rates a State may control United States rates.

This is abhorrent to me and I do not think it is the true construction.

Assuming without admitting that a terminal company cannot establish different switching rates for different zones I submit that the various railroads independently of what they pay for switching may establish one rate to East St. Louis and another to St. Louis, and in the absence of some action by Congress or the Interstate Commerce Commission there is no power to interfere with their doing so under this decree or otherwise.

Except Congress or the Interstate Commerce Commission act there is no one authorized to so order. Assuming again that the Terminal Company cannot establish different switching rates for different zones, I am satisfied that irrespective of what switching rates they have to pay the railroads have the right to charge a higher rate into St. Louis on Illinois coal than they do to East St. Louis on the same coal." (Rec. 71-72.)

The Government was not satisfied with this final decree, and on March 27, 1914, appealed to this Court and assigned the following errors:

I

"The complainant assigns as error the action of the court in denying the application and motion of the complainant to enter the interlocutory decree asked by the complainant.

II

The complainant assigns as error the failure and refusal of the court upon the record in this cause to enter an interlocutory decree in accordance with the opinion of the Supreme Court directing the complainant and the defendants herein to submit to the court within ninety days after the receipt of the mandate of the Supreme Court herein a plan for the reorganization of the contract between the fourteen defendant railroad companies and the Terminal Railroad Association of St. Louis, Missouri, which plan should eliminate the violation of law pointed out by the Supreme Court as being a combination made by defendants within the inhibition of the act of Congress of July 2, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraint and monopoly.'

III

The complainant assigns as error the failure and refusal of the court upon the record in this case to enter a final decree in accordance with the opinion of the Supreme Court effectively prohibiting the continuance of the combination, conspiracy and restraint of trade and commerce among the several states, as described in the complaint filed in this suit and found to exist by the Supreme Court and which said combination the Supreme Court decided was in violation of the act of Congress of July 2, 1890, to protect trade and commerce against restraint and monopoly.

IV

The complainant assigns as error the failure and refusal of the court in denying the applica-

tion and motion of the complainant to enter the final decree in the form as submitted and asked by the complainant.

V

The complainant assigns as error the failure and refusal of the court to direct the defendants herein to act in connection with the complainant in submitting to the court within ninety days after the receipt of the mandate in this case a plan for the reorganization of the contract between the fourteen defendant railroad companies and the Terminal Company so that the organization of the defendants and the operation of their properties and the contracts between defendants would cease to be in violation of the inhibition of the act of Congress of July 2, 1890.

VI

The complainant assigns as error the entry by the court of the final decree in this case as made and filed the second of March, 1914, in the office of the clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, because said final decree as entered is not in accordance with the opinion of the Supreme Court heretofore rendered in this cause, and does not effectively carry out the mandate of the Supreme Court so as to prevent the continuance by the defendants of the violation of the act of Congress against restraint of trade and monopoly of July 2, 1890.

VII

The complainant assigns as error the failure of the Court to provide in its final decree the exact form and conditions of the contract which should be executed between the defendants and a company or companies asking either joint use or joint ownership of the terminal facilities controlled by the defendants.

VIII

The complainant assigns as error the failure of the court to designate specifically in its final decree what contracts should have stricken out of them the portions thereof ordered eliminated by the opinion and mandate of the Supreme Court.

IX

The complainant assigns as error the action of the court in placing in its final decree the precise words, without more, of the fifth paragraph of the Supreme Court's order relating to the arbitrary charge in respect of traffic originating within the one-hundred-mile area, because to merely put the precise words of the fifth paragraph in the decree without more does not end litigation but establishes a starting point for further controversy.

X

The complainant assigns as error the action of the court in entering a final decree herein permitting the defendants to continue the existing organization of the Terminal Company and the combination for operation between the Terminal Company and the Wiggins Ferry Company and the Merchants Company and the several companies related to these above named corporations, after the complainant and the defendants had failed to come to an agreement in substantial accord with the opinion and decree of the Supreme Court because the order of the Supreme Court provided for a dissolution and not a continuance of the combination between said three above named corporations, the Wiggins, Terminal and Merchants Companies, upon the failure of the parties complainant and defendants to come to an agreement in accordance with the opinion of the Supreme Court and its decree." (Rec. 83-85.)

None of the defendants were satisfied with this final decree, and all the defendants, which included the Mis-

souri, Kansas & Texas Railroad, St. Louis-San Francisco Railway Company, Missouri Pacific Railroad Company, and The Chicago, Rock Island & Pacific Railway Company, now petitioners in this proceeding, through their special and general counsel, filed a motion on March 28, 1914, to modify the final decree as follows:

> "Come now the defendants in the above entitled cause and move the Court to modify Article 1 of the final decree herein entered, which is as follows:
>
> '1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified.
>
> An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered' by striking out all of said paragraph;

First For that, it appears that the defendants herein have conformed to the special directions contained in the Supreme Court's decree herein and the special directions of the interlocutory order of this Court herein, pursuant to the mandate of the Supreme Court, and, having done so, said Terminal Association has ceased to be an unlawful combination, contrary to the Anti-Trust Act of July 2, 1890, as found by this Court in the first paragraph of said Article 1.

Second. Because defendant, Terminal Railroad Association of St. Louis, is enjoined from making charges otherwise than for supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and is required to abandon all operating methods and charges as and for railroad transportation;

For that, while the general scheme and purpose of the Terminal Association and its subsidiary companies is that of affording terminal advantages and facilities to railroad companies, yet as an incident to that business, and on account of the necessary extent of its tracks, covering an area of seventy-five to one hundred square miles, it is frequently called upon to take traffic from one point on its line to another point on its line, completing the entire movement on its own tracks.

As an illustration: The Terminal Association operates in the early morning and late in the afternoon some trains to transport laborers engaged in industrial factories from Granite City, Illinois, to the different stations on its line in St. Louis, Missouri. This it is prohibited from doing under the decree.

Another illustration: Many factories are located upon the Terminal Association's tracks on both sides of the Mississippi River Under this order, the defendant, Terminal Association, would be restrained from accepting either raw material

or finished products shipped from one such factory to another, although it could, with great convenience to the public render such service.

These are incidents, but very important incidents, to the principal business of the Terminal Association, and, we submit, were not in contemplation of the decree ordered by the Supreme Court.

(Signed) T. M. Pierce, H. S Priest, Attorneys for Defendants." (Rec. 73-74.)

The Evens & Howard Fire Brick Company and the Union Sand & Material Company took notice of the provisions of this final decree and on June 20, 1914, filed petitions of intervention asking the Court to modify the decree so that beyond question a great deal of their traffic which originated and ended on the lines of the Terminal Companies might be handled for them, and that the Terminal Railroad Association of St. Louis, or any of its constituent companies, be not enjoined "from operating any of the properties belonging to it or its constituents, otherwise than as terminal facilities for the railroad companies using the same." (Rec. 74-81.)

The three Circuit Judges, Sanborn, Hook and Smith, permitted the intervening petitions to be filed, but on June 20, 1914, denied leave to intervene and at the same time denied the motion to modify the final decree as requested by all the defendants upon the ground that the Court was without jurisdiction owing to the appeal already taken by the Government to the Supreme Court of the United States. (Rec. 81-82.)

The Evens & Howard Fire Brick Company and the Union Sand and Material Company thereafter asked leave of this Court to intervene, which was granted, and on February 23, 1915, Mr. Chief Justice White,

now dead, delivered the opinion of this Court, 236 U. S. 194, in which the final decree of March 2, 1914, was modified as requested by the interveners and by all the defendants, but the contention of the Government that the decree should interfere with the jurisdiction of the Interstate Commerce Commission over the rates to be charged by the Terminal Companies or the mode of billing traffic passing over their lines, or the establishing of joint through rates or routes over their lines, or any other power conferred by law upon such Commission, was denied.

This Court refused to consider as an issue the contention of the defendants that they were qualified as an illegal combination, "although by complying with the requirements exacted by the decision of this Court, they were no longer subject to be so qualified," this Court saying:

> "But we treat that subject as not in controversy because we are of the opinion that the contention concerning it rests upon a wholly unwarranted criticism of a mere form of expression in the decree, unwarranted because on its face the decree unmistakably demonstrates the contention to be absolutely devoid of all merit." (Rec. 88.)

The Government, having thus been defeated in its effort to compel the defendant carriers to haul coal from the nearby mines in Illinois to St. Louis and to East St. Louis at the same rate, has subsequently treated this litigation with indifference and has been no longer interested.

The mandate of this Court, pursuant to the last decision of Mr. Chief Justice White, was filed in the District Court on May 4, 1915, and on May 7, 1915, all the defendants filed a motion requesting the Court to enter a draft of final decree then submitted. (Rec. 99.)

This proposed final decree asked the Court to approve the re-organization agreement which had been executed between the Terminal Railroad Association and the Proprietary Lines, and undertook to give effect to the directions of this Court with respect to the things the defendants should do and should not do to avoid being qualified as an illegal combination. (Rec. 99-109.)

Although all the defendant Proprietary Lines had jointly requested the entry of the final decree, according to the draft filed on May 7, 1915, some of these defendant Proprietary Companies, Missouri Pacific Railroad Company, St. Louis, Iron Mountain & Southern Railway Company, St. Louis Southwestern Railway Company, Chicago, Rock Island & Pacific Railway Company, St. Louis & San Francisco Railroad Company, and the Missouri, Kansas & Texas Railway Company, on February 12, 1916, filed in the District Court a separate motion for entry of a final decree, which in their judgment would conform to the opinion and mandate of the Supreme Court. (Rec. 110-114.)

They also submitted their form of a draft of a final decree. (Rec. 114-115.)

Neither the motion filed on May 7, 1915, for the entry of a final decree submitted on behalf of all the defendants, nor the motion filed on February 12, 1916, on behalf of some of the defendants, was granted by Circuit Judges Sanborn, Hook and Smith, but on February 7, 1917, these Judges entered a decree that the mandate of this Court of April 23, 1915, be entered and that conformably thereto Paragraph 1 of the former final decree of January 29, 1914, be modified to read as follows:

> "The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the

Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing and the like, and modifying its contracts as herein specified. An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered. Provided, however, that the right of said Terminal Railroad Association as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same is hereby recognized, and nothing in this decree shall be construed to deny such right." (Rec. 123.)

THE PLEADINGS

This old litigious tree for some years thereafter blossomed and burgeoned, yet some of the defendant Proprietary Lines were not quiescent, and, after much murmuring and muttering, on August 12, 1920, the

defendants, Missouri, Kansas & Texas Railway Company, St. Louis-San Francisco Railway Company, Missouri Pacific Railroad Company, and the Chicago, Rock Island & Pacific Railway Company, hereinafter called West Side Lines, filed a motion in this case asking that the defendant Proprietary Lines, other than themselves, hereinafter called East Side Lines, the Terminal Companies, together with their officers and directors, be ordered to show cause why they should not be punished for contempt of the final orders and decrees of this Court and for other relief. (Rec. 124.)

MOTION OF WEST SIDE LINES

This motion is largely recitative and argumentative and undertakes to describe historically, according to the understanding of the West Side Lines, all that had transpired of materiality in this case down to date.

In the meanwhile Judge Smith had died so this motion was addressed to Circuit Judges Sanborn, Hook and Stone, then constituting the District Court.

A grievous complaint against the East Side Lines and the Terminal Companies was that through the domination of their directorates the East Side Lines were causing the Terminal Companies to be operated as common carriers engaged in a general transportation business, thus violating the final decree of March 2, 1917, which limited their activities as common carriers to business exclusively originating, moving and intended for delivery on their lines.

As evidence of the nefarious practices of the Terminal Companies, the West Side Lines charged that the Terminal Companies were not acting as the bona fide and impartial agents of the various Proprietary Lines, but were issuing passes and concurrences, and

were filing tariffs and division sheets with the Interstate Commerce Commission, and carrying on business generally like a railroad common carrier and a railroad transportation company; that the Terminal Companies acted as general transportation companies in the hauling and handling of express and the mails of the United States.

All these charges, however, may be treated lightly and as *nugae canorae* since the essence of all the complaints of the West Side Lines and the actual grounds for their dissatisfaction are set forth in the Fifteenth Paragraph of their petition, which is as follows:

> "Fifteenth. All of the Proprietary Companies, parties to this cause, and not signing this motion, have at all times since the rendition of said decree, violated and continue to violate, the fourth condition prescribed by the Supreme Court of the United States, upon which the Terminal Railroad Association was permitted to continue to transact business,
>
> 'by providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis or to points beyond,' but each and all of said Proprietary Companies not signing this motion, continue the illegal practice of billing to East St. Louis and then rebilling traffic destined to St. Louis and to points beyond, thus assessing all the transfer charges across the Mississippi River on through freight, moving both east and west, against the West Side Lines, and, notwithstanding said condition prescribed by said United States Supreme Court and by this Court in its decree, each and all of said Proprietary Companies, not signing this motion, have continued, ever since said decree, and still continue the same as before, to have all their tariffs break on the east side of the river at East St. Louis on all

traffic moving through the St. Louis gateway, thus continuing in effect, instead of abolishing, the said existing illegal practice of billing to East St. Louis or other junction points, and then rebilling the traffic destined to St. Louis or points beyond, in violation of the terms and conditions of said final decree and the rights of your petitioners, parties signing this motion." (Rec. 148-149.)

ORDER TO SHOW CAUSE

On November 19, 1920, Circuit Judges Sanborn, Hook and Stone, before whom this motion of the West Side Lines had been filed, ordered that the East Side Lines, the Terminal Companies, and their officers and directors show cause on December 14, 1920, why they and each of them should not be punished for contempt of Court for disobeying said decree and for failure to comply therewith. (Rec. 168.)

This order to show cause closely follows the charges set out in the motion filed by the West Side Lines, and the respondents were called upon to answer the alleged violations of the orders and decrees of the Court as specified in said motion.

JOINT AND SEVERAL ANSWER AND RETURN OF THE TERMINAL COMPANIES AND HENRY MILLER, THEIR REPRESENTATIVE, TO THE ORDER TO SHOW CAUSE

On December 13, 1920, the Terminal Companies and their representative, Henry Miller, filed a joint and separate answer to said order to show cause. (Rec. 175.)

In this joint and separate answer and return the following affirmative defenses were advanced:

I

"Aver that all the matters and things set out in the petition and order to show cause, and charged by the petitioners as constituting a disobedience of the orders and decrees of this Court, are not subjects for judicial cognizance, but are wholly within the jurisdiction of the Interstate Commerce Commission and outside the jurisdiction of this Court, for the following reasons:

First. The only complainant herein was the United States of America; the issues made were between that complainant and the defendants in this suit, which defendants were the various railroad corporations instituting the present proceeding, and the persons against whom these proceedings are now endeavored to be taken.

No cross-bills were filed in said cause, and no issues made as between the defendants themselves or any of them, nor any relief sought by any defendant against any other defendant.

The complainant in said cause has evinced no dissatisfaction with the method in which the decree has been executed, nor in any way complained that the injunction contained in said decree has been in any way violated.

Under these circumstances the respondents submit that if any relief is to be sought against them on behalf of any of the corporations now parties complainant, such relief should be by an independent action, and cannot be granted in this proceeding.

Second. Whether these Terminal companies are common carriers or not, whether they should be permitted to file tariffs or not with the Interstate Commerce Commission and the State Commissions of Missouri and Illinois prescribing their rates and charges for their own services and their participation in the rates and charges of the Proprietary and Non-Proprietary Lines which make use of their facilities, are subjects fully covered by Par.

7 of the directions of the Supreme Court in the case reported in 224 U. S. 382, and by section 6 of of the final decree of this Court, entered March 2, 1914, wherein this Court declared that nothing in the final decree should be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.

Third. Because the Transportation Act of 1920 amended the Act to Regulate Interstate Commerce so that these Terminal Companies are now beyond any question common carriers and subject to the original and exclusive jurisdiction of the Interstate Commerce Commission. Subsection 3, par. 149 Sec. 400, Transportation Act of 1920, provides as follows:

'Wherever the word "carrier" is used in this act it shall be held to mean "common carrier." The term "railroad" as used in this act shall include all bridges, car floats, lighters and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease, and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property designated herein, including all freight depots, yards and grounds used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this act shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation,

refrigeration or icing, storage and handling of property transported.'

"Sub-section A, paragraph 57, Section 208, of the Transportation Act of 1920, provides as follows:

'All rates, fares and charges, and all classifications, regulations and practices, in anywise changing, affecting or determining any part of the aggregate of rates, fares or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law.'

"Sub-section B, paragraph 58, Section 208, of the Transportation Act of 1920, provides as follows:

'All divisions of joint rates, fares or charges which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively.'

"From the foregoing provisions of the Transportation Act of 1920 these terminal companies aver, that this Court has no jurisdiction to change, modify or disturb in any way any of the rates, fares or charges of these Terminal Companies now in effect, and which were in effect on February 29, 1920, but that the same shall continue in force until thereafter changed by the Interstate Commerce Commission or by the State Commissions of Missouri and Illinois, nor has this Court jurisdiction over the division of any joint rate, fare or charge of any of the East Side Lines or the West Side Lines which are now in effect and which were in effect on February 29, 1920, but the same can only be charged by mutual agreement between the carriers or by the Interstate Commerce Commission

or the State Commissions of Missouri and Illinois.

Fourth. If the petitioners be dissatisfied with the present rate adjustments and divisions of rates or absorption of terminal charges, or the division of the cost of the carriage of traffic across the Mississippi River at St. Louis, or if the petitioners be dissatisfied with the present-tariffs on file with the Interstate Commerce Commission, whereby it is claimed all the East Side Railroads, both Proprietary and non-Proprietary Lines ending in East St. Louis, assume none of the cost of the carriage of through traffic crossing the Mississippi River either eastbound or westbound, the Transportation Act of 1920 designates the Interstate Commerce Commission as the exclusive forum and tribunal where relief should be sought.

Sub-section 6, paragraph 213, Section 418, of the Transportation Act of 1920, provides as follows:

'Wherever, after full hearing upon complaint or upon its own initiative, the Commission is of the opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the carrier parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several

carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.'

"From the foregoing provisions of the Transportation Act of 1920 these defendants aver, that if the petitioners be entitled to any relief against existing rate conditions whereby they are unfairly discriminated against in the operation of these terminal properties, and in favor of the East Side Lines, they should address themselves solely to the Interstate Commerce Commission and not to this Court for relief.

Fifth. These defendants aver that as this cause was brought under the Sherman Anti-Trust Act by the United States District Attorney of this judicial district at the direction of the Attorney-General of the United States, as required by law, these contempt proceedings cannot be instituted by the petitioners, co-defendants with these Terminal Companies and other defendants in this cause, and these defendants aver that this Court should not undertake to administer or settle the rights of the various defendants as between themselves, nor attempt to grant relief to one set of defendants against another set of defendants, when the complainant, the United States, is satisfied

with the orders and decrees in this cause and is not now making, and has never made, any demand to have any of the defendants punished for contempt because of disobedience to any order or decree of this Court." (Rec. 176-179.)

This Court will note that the contention is broadly advanced that all the matters of complaint of the West Side Lines were wholly within the jurisdiction of the Interstate Commerce Commission even before the enactment of the Transportation Act of 1920, and that this comprehensive legislation left nothing to the decision of a Court, but conferred upon the Interstate Commerce Commission original and exclusive control of the operating, as well as administrative, practices of the Terminal Companies.

The charges in the motion of the West Side Lines were then specifically admitted, denied or explained, and the nature, character and extent of their operations as common carriers in handling the freight and passenger business for the Proprietary and Non-Proprietary Lines were explained as follows:

"With respect to the allegations of the first section deny that Terminal Companies have at any time violated the final decree of this Court in this cause, dated January 29, 1914, filed March 2, 1914, nor have they violated at any time the decree of this Court, dated January 29, 1917, filed February 7, 1917, modifying said final decree of January 29, 1914, and deny that they have at any time engaged in the business of a general transportation railroad company, but aver that they had, long prior to the entry and filing of said decrees, abandoned all practices condemned in the various decisions of the Supreme Court of the United States in this cause, and which were prohibited and enjoined by the decrees and orders of this Court.

Pursuant to the opinions of the Supreme Court

of the United States in this cause, reported in 224 U. S. 382, and 226 U. S. 420, and in obedience to the mandate of the Supreme Court this Court, on the sixteenth day of June, 1913, entered a preliminary decree requiring the defendants to submit a plan of reorganization within sixty days thereafter which would conform to the seven specifications made by the Supreme Court in its opinion reported in 224 U. S. 382. Thereafter the defendants timely submitted such plan which was approved by this Court, and on March 2, 1914, this Court entered a final decree purporting to give force and effect to the opinions and mandate of the Supreme Court, and section six of said decree provided as follows:

'Nothing in this decree shall be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.'

"Neither the United States, the defendants, nor certain intervening industrial companies doing business on the lines of these terminal companies, were satisfied with said final decree, and consequently all these parties duly and regularly perfected appeals to the Supreme Court.

Thereafter the Supreme Court rendered an opinion in this case, reported in 236 U. S. 194, denying the contention of the United States that these Terminal Companies were not common carriers, and this opinion declared that these Terminal Companies were common carriers and subject exclusively to the regulatory jurisdiction of the Interstate Commerce Commission and the Commissions of the States of Missouri and Illinois, where their lines are located. Mr. Chief Justice White, speaking for the Court and discussing the same propositions then advanced by the

United States, but now urged by the petitioners, said:

'The contention that the Terminal Company and the combination which it embodied was not dissolved and was permitted to continue in business solely because if allowed to continue it would be obliged to confine itself to terminal business in the strict sense and therefore should not be permitted to now do other than purely terminal work rests upon a misapprehension of the conditions. The suit to dissolve was largely defended upon the ground that the combination was formed for terminal purposes and that to combine for the purpose of obtaining facilities of that character was not in conflict with the anti-trust act. In disposing of the case the correctness of this contention in the abstract was conceded, but as it was found that the geographical situation, the area over which the Terminal Company operated and the business which it carried on, in other words, its general environment, took it out of the conceded abstract general rule, it was decided that the combination if it wished to continue in business must execute certain agreements for the benefit of the public modifying the terms under which it was organized. The proposition therefore now is that although the duty to execute agreements arose and its performance was compelled because the Terminal Company was not to be dealt with in the light, abstractly speaking, of a strictly terminal organization, nevertheless upon the execution of the agreements its rights are to be measured upon the contrary assumption.'

"Deny that these terminal companies have handled any traffic, wherever destined and wherever originated or routed, other than as strictly terminal companies, or other than common carriers engaged in strictly terminal business as provided in the decree of this Court, but these defendants aver that these terminal companies neither own nor operate any freight or passenger cars, as do

general transportation companies like the other defendant railroads, but their business consists in carrying the freight and passenger equipment not only of the fourteen Proprietary Lines connecting with their rails at East St. Louis, Illinois, and vicinity, and at St. Louis, Missouri, and vicinity, but in performing like service for other railroads and common carriers having such connections which have no proprietary interest in these Terminal Companies. These Terminal Companies in the performance of their strictly terminal business, also classify in freight yards the cars for the proprietary and Non-Proprietary Lines, and with their engines and switching crews deliver such cars for the Proprietary and Non-Proprietary Lines to industries located on both sides of the Mississippi River, or they deliver such cars to the general transportation companies for through movements beyond these terminals.

"The Non-Proprietary Lines which are served by these Terminal Companies and their subsidiaries are:

On the East Side:
Alton & Southern Railroad,
Chicago & Eastern Illinois Railroad,
Chicago, Peoria & St. Louis Railroad,
East St. Louis, Columbia & Waterloo Railway,
East St. Louis Junction Railway Company,
Litchfield & Madison Railway,
Mobile & Ohio Railroad Company,
St. Louis & Belleville Electric Railway,
St. Louis & O'Fallon Railway,
St. Louis, Troy & Eastern Railroad,
Southern Traction Company of Illinois,
Toledo, St. Louis & Western Railroad.

On the West Side:
Illinois Traction System,
Inland, Waterways—Mississippi Warrior Section,
Manufacturers Railway.

"The rails of these Terminal Companies and their facilities are the only means by which these Non-

Proprietary Lines, as common carriers, can engage in interstate commerce between Missouri and Illinois, or have their traffic carried across the Mississippi River at this gateway, and as typical of the activities of these Terminal Companies and their subsidiaries, they carried over their bridges and with their ferry in 1917 for the Proprietary and Non-Proprietary Lines the following number of cars and tons of freight:

Eastbound:

	Cars	%	Tons	%
Proprietary Lines	307,938	72.3	6,566,472	73
Non-Proprietary Lines	85,249.	27.7	1,775,100	27
Westbound:				
Proprietary Lines	277,311	67.6	7,126,748	61.7
Non-Proprietary Lines	132,878	32.4	4,411,633	38.3

Includes all Proprietary Lines and only ten Non-Proprietary Lines.

As a further example of how essential the continued operations of these Terminal Companies as common carriers is to the Non-Proprietary, as well as the Proprietary, Lines, a statement covering the movement of Illinois bituminous coal into East St. Louis, Illinois, and St. Louis, Missouri, and beyond through St. Louis, shows that this tonnage was made up, for the periods stated, as follows:

	1915	1916	1917
Proprietary Lines	59%	57%	50%
Non-Proprietary Lines	41%	43%	50%

For the year 1917 this Illinois bituminous tonnage amounted to 9,403,366 tons.

The commercial coal hauled by these Non-Proprietary Lines from the mines in Illinois and delivered through the facilities of these Terminal Companies to industries in St. Louis was as follows:

Year	Tons	Per cent
1915	876,733	60
1916	1,012,387	59
1917	1,099,037	63

The hauling and carrying of the freight and passenger traffic for these Non-Proprietary Lines is required by these Terminal Companies and their subsidiaries by the Interstate Commerce Commission and the State Commissions of Missouri and Illinois, and if the contention of the petitioners be sustained, and these Terminal Companies and their subsidiaries should be restricted or prohibited in their activities as common carriers the Non-Proprietary Lines would be without terminal facilities and without any means for having their traffic, so essential to the commercial and industrial life of this community, carried across the Mississippi River. Such a result would bring about an intolerable situation and commerce between the States of Illinois and Missouri, which should be encouraged and promoted, would be throttled and paralyzed." (Rec. 183-186.)

The charge that the Terminal Companies were not acting as the bona fide and impartial agents of the various Proprietary Lines was denied. It was averred that the Terminal Companies as common carriers engaged in a strictly terminal business for all the Proprietary, as well as the Non-Proprietary, Lines without discrimination, and their conduct was in perfect harmony with the final decree of the Court, the Sixth Section of which placed these Terminal Companies, their rates and charges, under the power of the Interstate Commerce Commission, and gave the Interstate Commerce Commission authority to prescribe the mode of billing the traffic over their lines and the establishment of rates or routes over their lines. (Rec. 187.)

The following explanation, with respect to the charge that the Terminal Companies were illegally handling express and United States mail, and the attitude of the Government towards these Terminal Companies, before, during and after Federal Control, was set forth:

"That until the enactment of the General Postal Act by Congress on July 28, 1916, pursuant to special legislation annually enacted by Congress, beginning with the Act of Congress of March 1, 1899 (30 Stat. L. 965, Compiled Stat. 1901, Sec. 4005; Fed. Stat. Ann. Bol. 5, p. 925, Sec. 3), fifty thousand dollars ($50,000) or thirty-five thousand dollars ($35,000) was appropriated as compensation per annum 'for the special transfer and terminal service between the Union Station, East St. Louis, Illinois, and the Union Station, St. Louis, Missouri, including the use, lighting and heating of the mail buildings and the transfer service at St. Louis,' and paid to defendant Terminal Railroad Association of St. Louis, which specially transferred the mails and performed said terminal service. The provisions of said General Postal Act authorized the Postmaster General, for the year 1916, to pay not exceeding thirty-five thousand dollars ($35,000) for said special transfer and terminal service at the Union Station, East St. Louis, and at the Union Station, St. Louis, Missouri, including the use, heating and lighting of the mail building and transfer service at St. Louis, Missouri, but contained a general provision that 'hereafter service over property owned or controlled by another company, or a terminal company, shall be considered service of the railroad company using such property, and not that of other or terminal company.' Hence, by virtue of said general legislation of 1916 service in handling the mails, performed by Terminal Companies, has been considered service of the railroad companies which use the properties of the Terminal Companies, and the Government has adjusted the

mail pay accordingly; but these defendants deny that the Government of the United States is paying the Proprietary and Non-Proprietary Lines as general transportation companies for hauling the mails over these terminal properties, because of any decisions of the Supreme Court or by reason of any final order or decree of this Court, or on account of any agreement between the defendant Terminal Railroad Association of St. Louis and the Proprietary Companies. Both the Proprietary Companies and the Non-Proprietary Companies alike are observing the provisions of said General Postal Act.

These Terminal Companies have at all times been treated by the Government of the United States as common carriers, and these Terminal properties were taken over by the Government and operated during Federal Control by the United States Railroad Administration as common carriers under the provisions of the Federal Control Act. Each of these Terminal Companies contracted with the Government for the use of their properties during Federal Control, and executed the standard form of contract, as did other common carriers. The United States Railroad Administration during the entire period of Federal Control operated these Terminal properties according to the same practices and methods and in the same manner as they are now being operated.

During Federal Control the United States Railroad Administration dealt with these Terminal Companies as separate corporate entities and as common carriers subject to the provisions of the Federal Control Act, and advanced them funds from time to time to meet their corporate obligations, and determined their just compensation upon a basis of their earnings during the test period according to reports filed by these Terminal Companies as common carriers with the Interstate Commerce Commission. The Interstate Commerce Commission, the United States

Treasury Department and the United States Railroad Administration have dealt with these Terminal Companies during the guaranty period as carriers and subject to the provisions of the Transportation Act of 1920, which were accepted by these Terminal Companies. These Terminal Companies have made application to the Interstate Commerce Commission as common carriers for loans to meet maturing corporate debts, to be reimbursed for deficits arising from operations during the guaranty period, and to make necessary additions and betterments to their properties, and such applications have been granted and payments authorized by the Interstate Commerce Commission, and the funds so authorized have been paid through the Treasury Department of the United States to these Terminal Companies." (Rec. 189-191.)

On December 14, 1920, the East Side Lines and their defendant representatives filed a

MOTION TO DISMISS PETITION AND QUASH RULE TO SHOW CAUSE

as follows:

"1. The only complainant in this cause was the United States of America on the relation of the Attorney General. The issues made were between that complainant and the defendants in the suit, these defendants being the various railroad corporations instituting the present proceedings, and the persons against whom these proceedings are now endeavored to be taken.

2. No cross-bills were filed in said cause, and no issues made as between the defendants themselves or any of them, nor any relief sought by any defendant against any other defendant.

3. The said cause could not have been instituted except by the United States of America on relation of the Attorney General, and as the com-

plainant has showed no dissatisfaction with the method in which the decree has been executed, nor in any way complained that the injunction contained in said decree has been in any way violated, it is not competent for any other person to endeavor to prosecute this cause, or to obtain any orders herein, the sole litigant having authority so to do being the said United States of America on the application of the said Attorney General.

4. The final decree entered herein contained the following clause:

'Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its line, or any other power conferred by law upon the Commission.'

"Each and all of the alleged grievances of the petitioners herein come within the ambit of the power of the Interstate Commerce Commission, and if they exist can only be corrected by the orders of that Commission. The enactment of the Transportation Act and its amendment of the Interstate Commerce Act has covered the whole field of the decree herein, and it is to the provisions of such Transportation Act, Interstate Commerce Act and to the remedies given thereunder that the petitioners must appeal. It is submitted that the same are exclusive in their nature and character, and embrace the whole subject matter of the decree and its enforcement." (Rec. 174-175.)

The East Side Lines and their officials also filed, on December 14, 1920, an

ANSWER

in which they made substantially the same contentions as those put forward by the Terminal Companies. (Rec. 194-209.)

On January 27, 1921, an order was entered by the Court appointing an Examiner to hear the testimony offered by the parties and to make prompt return of all such evidence taken by him. (Rec. 210.)

Pursuant to said appointment the Examiner took this testimony and evidence, commencing on February 2, 1921, and ending on February 17, 1921, made return, and a

STATEMENT OF EVIDENCE

was filed in this case on April 24, 1923. (Rec. 211.)

TESTIMONY FOR WEST SIDE LINES

The original case brought under the Sherman Anti-Trust Act had been placed in the exclusive charge of Judge Henry S. Priest, Special Counsel for all these defendants, and the following extract from the minutes of a meeting of the Board of Directors of the Terminal Railroad Association, held February 12, 1917, shows that the President of the Terminal Railroad Association, after receiving a report from the General Counsel on February 9, wrote to Special Counsel Priest for an opinion as to the legality of the operating and administrative practices of these Terminal Companies:

> "General Counsel Pierce, under date February 9, reported as follows:
>
> 'The United States Circuit Judges on February 7, 1917, caused to be entered an order and decree in the Federal litigation brought by the Government against this association and its Proprietary Lines. I send you herewith twenty printed copies of this order and decree for immediate distribution among the members of your board. I have already advised the Counsel of the Proprietary

Lines and sent them copies of this order and decree.'

"Upon receipt of above letter I sent to each member of the board a copy of the order and decree, and wrote to Judge H. S. Priest, Special Counsel who had exclusive charge of this litigation, by authority of this board, the following letter, under date February 9:

'Please advise me whether or not it will be necessary for this company to make any change in its present operating and administrative practices, in the light of the recent order and decree of the United States Circuit Judges in the Federal litigation brought under the Sherman Anti-Trust Act, against this association and its Proprietary Lines.'" (Rec. 214-215.)

These same minutes show that on February 9, 1917, Special Counsel Priest replied as follows:

"In your communication of today you ask me to advise you 'whether or not it will be necessary for this company to make any change in its present operating and administrative practices, in the light of the recent order and decree of the United States Circuit Judges' in the above case.

I must answer this question in the negative. The Court, in ordering the decree, added a proviso to the first paragraph of its decree of January 29, 1914, which is as follows:

'Provided, however, that the right of said Terminal Railroad Association as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same is hereby recognized, and nothing in this decree shall be construed to deny such rights.'

This provisional paragraph must be construed in harmony with the sixth paragraph of the decree of January 29, 1914, which is as follows:

'6. Nothing in this decree shall be taken to af-

fect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.'

Under the Interstate Commerce Law, in my opinion, your company is bound to file its tariff rates with the Commission, and I am informed that the Interstate Commerce Commission, by a formal order, required it to file its rates. And I am further of the opinion that it must, under the Interstate Commerce Law, file its tariffs for joint through rates and routes over its lines. These things I understand your company has always done. I think it is bound to continue doing them, and I so advise you." (Rec. 215.)

The West Side Lines did not accept with complacency this opinion of their Special Counsel, and at a meeting of the Board of Directors of the Terminal Railroad Association held February 11, 1918, the West Side Lines presented a copy of their motion, which they afterwards filed, seeking to have the East Side Lines and the Terminal Companies punished for contempt of the final decrees and orders of the Court, and an extract from these minutes shows that the following resolution was submitted:

"Resolved: That the president and other officers of this company be, and they are hereby, directed to forthwith abandon all operating methods and charges as and for railroad transportation, and confine itself to the transaction of a terminal business except such transportation business as exclusively originates on its lines, exclusively moved thereon and is intended for delivery on the same, and to immediately discontinue all other methods and practices complained of in pro-

posed motion of Missouri, Kansas & Texas Railway Company, St. Louis-San Francisco Railway Company, Missouri Pacific Railroad Company and Chicago, Rock Island & Pacific Railway Company in the suit of United States of America vs. Terminal Railroad Association, et al.

It was given consideration, and, upon motion, duly seconded, and unanimously voted, it was

Resolved: That consideration of the foregoing resolution be deferred to the next meeting of the Board of Directors.

Upon motion, the meeting adjourned." (Rec. 222.)

Action on this motion by the West Side Lines was accordingly deferred, and at a meeting of the Board of Directors of the Terminal Railroad Association, held March 11, 1918, the following resolution was considered:

"Resolved: That the president and other officers of this company be, and they are hereby directed to forthwith abandon all operating methods and charges as and for railroad transportation, and confine itself to the transaction of a terminal business except such transportation business as exclusively originates on its lines, exclusively moves thereon and is intended for delivery on the same, and to immediately discontinue all other methods and practices complained of in proposed motion of Missouri, Kansas & Texas Railway Company, St. Louis-San Francisco Railway Company, Missouri Pacific Railroad Company and Chicago, Rock Island & Pacific Railway Company in the suit of United States of America vs. Terminal Railroad Association et al."

Thereupon it was resolved by a majority vote of seven for and six against that the foregoing resolution be not adopted, but that as an amendment thereto, and in lieu thereof, the following resolution be adopted:

Resolved: That it is the opinion and sense of this board that the Terminal Railroad Association of St. Louis is now, and has been, operating in all respects in complete conformity with the terms of the final order and decree of the United States Circuit Judges entered in the suit of the United States of America versus Terminal Railroad Association of St. Louis." (Rec. 230.)

Again at a meeting of the Board of Directors of the Terminal Railroad Association held May 10, 1920, the West Side Lines submitted the following motion:

"Resolved: That the officers of this company be, and they are hereby, directed to abandon all operating methods and charges as and for railroad transportation, and confine themselves to the transaction of a terminal business, such as supplying the operating facilities for the interchange of traffic between railroads, and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing and the like, except that they may, as an accessory to the company's strictly terminal business, carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery upon the same.

"Resolved Further: That the officers of this company be, and they are hereby, directed to cancel all existing tariffs filed with the Interstate Commerce Commission, or any other commission, as an intermediate transportation company, and to discontinue making charges on through business, otherwise than as a switching or terminal agency.

"Resolved Further: That the officers of this company be, and they are hereby, directed to discontinue the practice of issuing passes as a transportation company, except as to passengers whose origin and destination are upon the rails of this company.

"Resolved Further: That the officers of this company be, and they are hereby, directed to discontinue any other practices or methods of operation in violation of the final decree of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, in the case of United States of America, complainant, vs. Terminal Railroad Association, et al., defendants, filed in said cause on February 7, 1917."

The matter was given consideration, and, upon motion, duly seconded, and unanimously voted, it was

Resolved: That action by the Board of Directors on the foregoing resolution be deferred until the next meeting of the Terminal Railroad Association of St. Louis Board of Directors, which should be held June 14, 1920." (Rec. 232-233.)

Action on this motion was deferred until a meeting of the Board of Directors of the Terminal Railroad Association was held on June 14, 1920, when, at the instance of the West Side Lines, the following proceedings were had:

"At the meeting of the Board of Directors, held May 10th, 1920, the following resolution was submitted, and by resolution action deferred to the meeting of the board to be held June 14, 1920:

Resolved: That the officers of this company be and they are hereby, directed to abandon all operating methods and charges as and for railroad transportation, and confine themselves to the transaction of a terminal business, such as supplying the operating facilities for the interchange of traffic between railroads, and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing, and the like, except that they may, as an accessory to the company's strictly terminal business, carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery upon the same.

Resolved Further: That the officers of this company be, and they are hereby, directed to cancel all existing tariffs filed with the Interstate Commerce Commission, or any other commission as an intermediate transportation company, and to discontinue making charges on through business, otherwise than as a switching or terminal agency.

Resolved Further: That the officers of this company be, and they are hereby, directed to discontinue the practice of issuing passes as a transportation company, except as to passengers whose origin and destination are upon the rails of this company.

Resolved Further: That the officers of this company be, and they are hereby, directed to discontinue any other practices or methods of operation in violation of the final decree of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, in the case of United States of America, Complainant, vs. Terminal Railroad Association of St. Louis, et al., Defendants, filed in said cause on February 7, 1917.'

Upon motion, duly seconded, the following preamble and resolution was submitted as a substitute for the resolution submitted at the meeting of the board held May 10, 1920, and was adopted; nine votes being cast in favor of its adoption and four votes opposed to its adoption.

Whereas, Controversy exists between the West Side Lines and the East Side Lines as to the payment or assumption of charges for transfer of freight from one side of the river to the other, which has been brought to the attention of this board, and

Whereas, The West Side Lines have manifested their opinions that said controversy may be adjusted by what they term a compliance with the decree of the Court in the case of the United States against this association, and others, under

the Sherman Act, and have threatened to involve the association in further proceedings in that case upon the supposed failure to comply with said decree,

Therefore, Be it Resolved: That this association in its independent capacity is in no way interested as to which of the Proprietary Lines should bear such charges, and should not in any manner participate in said controversy.

Be it Further Resolved: That the procedure of this association in compliance with said decree, and the decisions of the Supreme Court of the United States upon which it was predicated, has in all things been pursuant to the advice of its general and special counsel, and is therefore, believed to be correct." (Rec. 239-240.)

The record shows that four votes were cast in opposition to the substitute motion by the West Side Lines and nine votes for the resolution were cast by the East Side Lines. (Rec. 241.)

In response to an inquiry, on October 13, 1915, the President of the Terminal Railroad Association wrote the Receiver of the St. Louis & San Francisco Railroad, a West Side Line, the following:

"I beg to acknowledge receipt of your letter of the 12th instant, with copy of your letter addressed to members of our board.

At the September meeting, when the question of our operation was under consideration, I was requested to get an opinion from our General Counsel, Mr. Pierce, as to whether our present methods of conducting the Terminal properties were in accordance with the law. The resolution adopted at that meeting was transmitted to General Counsel Pierce for an opinion. At the same time I sent a copy of the resolution to Judge H. S. Priest, who, as you know, has charge of this litigation, asking him to give me an opinion, in writing, as to whether or not the conduct of our affairs was in

accordance with the decision of the Supreme Court. The opinion received from Judge Priest I transmitted, together with General Counsel Pierce's opinion, to the meeting of the board held on Monday last, and same will appear in the minutes to be sent out later.

It seems to me that the opinion of our General Counsel and the opinion of Special Counsel Priest are directly addressed to the points you make in your letter with reference to the physical operation of these properties. Both opinions held unequivocally that this association is a common carrier and that it should file its tariffs and concurrences in through tariffs with the Interstate Commerce Commission. However, in order that there may not be the slightest misunderstanding on this score, I am sending a copy of your letter to General Counsel Pierce, and a copy to Special Counsel Priest—who is still in charge of this litigation, and will be until it is finally terminated when the Circuit Judges meet here in December—with the request that I be again given their opinion after your letter has been read and considered.

As soon as these opinions have been received I will send to you and the other members of the board copies of same, and will then take up with you the question of calling a special meeting of the board or Executive Committee to give the questions involved further consideration." (Rec. 242-243.)

On September 30, 1915, the President of the Terminal Railroad Association wrote the Receiver of the Missouri, Kansas & Texas Railway Company, a West Side Line, as follows:

"Please refer to my letter 28th instant, with which I sent you written opinion from General Counsel Pierce, pursuant to resolution adopted by the board at a meeting held September 13.

At the time the Supreme Court handed down its decision in the Federal litigation, Special Counsel

H. S. Priest, who had complete charge of this litigation, gave me an opinion, which I transmitted to the board, that after the objectionable features in the contract of 1889, between the Terminal Railroad Association and the Proprietary Lines, were stricken out, our agreement and our operating methods would then be within the requirements of the law.

After receiving General Counsel Pierce's opinion I wrote to Judge Priest, as follows:

'At a meeting of the Board of Directors held on September 13, 1915, the following resolution was adopted:

"Resolved: That the president be, and hereby is, requested, within two weeks, to transmit to each member of the board a copy of a written opinion from General Counsel Pierce as to whether or not the Terminal properties are at this time being operated in conformity with, or in violation of, the final decree of the Supreme Court of the United States rendered in the case of the United States of America versus Terminal Railroad Association of St. Louis and others."

'Since the rendition of the final decree in the Federal litigation, the Terminal properties have been operated according to your direction; no changes have been made except those suggested by you. Will you please advise me whether the Terminal properties are now being operated in violation of the final decree.'

"In reply to above communication, Judge Priest wrote me as follows:

'September 29, 1915.

Mr. W. S. McChesney, Jr.,
President Terminal Railroad Ass'n of St. Louis,
Union Station, City,

Dear Sir:

You say in a letter to me of the 29th instant that the Board of Directors of the Terminal Asso-

ciation at its last meeting passed the following resolution, to-wit:

"Resolved: That the president be, and hereby is, requested, within two weeks, to transmit to each member of the board a copy of a written opinion from General Counsel Pierce as to whether or not the Terminal properties are at this time being operated in conformity with, or in violation of, the final decree of the Supreme Court of the United States rendered in the case of the United States of America versus Terminal Railroad Association of St. Louis and others," and add that the Terminal properties since the decree was first ordered by the Supreme Court (in United States v. Terminal Railroad Association, 224 U. S. 383) have been operated in exact accordance with my advice to you as special counsel in that case.

'While the language used in the argument of the opinion leading to the announcement of the conclusion of the Court in that case was sometimes lacking in precision and gave some occasion for diversity of views as to its meaning, the decree ordered by the Court was specific and to my mind perfectly clear, as it was also to the mind of the special committee of the general counsel of the railway companies composed of Messrs. Williams, Blodgett and Humphrey, and Mr. Pierce, General Counsel of the Terminal Association, who were appointed by a convention of the general counsel of all of the Proprietary Lines to confer with me as to the plan of complying with the decree, and later by all of said general counsel in a meeting called by the special committee to receive a report of the plan."

'The decree of the Supreme Court required only the following things to be done to comply with the law, namely:

A "reorganization of the contract between the fourteen defendant railroad companies and the Terminal Company, which we have pointed out as bringing the combination within the inhibition of the statute."

First. By providing for the admission of any railroad company to joint ownership and control of the combined Terminal properties.

Second. By admitting any railroad company not desiring to become a member to the use of the terminal facilities upon reasonable terms.

Third. By eliminating from that contract any provision which restricts the Proprietary Companies to the use of the facilities of the Terminal Company.

Fourth. By abolishing the practice of billing to East St. Louis and then rebilling to St. Louis traffic destined to St. Louis or points beyond.

Fifth. By abolishing any special or socalled arbitrary charge for the use of the terminal facilities in respect of traffic originating within a one-hundred-mile area that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user and the Terminal Company or Proprietary Companies, which shall arise after a final decree in the case, may be submitted to the District Court, upon a petition filed in the cause, subject to review by appeal in the usual manner.

The final clause in the special decree, in order to avoid any misapprehension, provides that the decree must contain a provision that nothing shall be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.

I was of the opinion then, and so advised you, and this advice was concurred in by the special committee above mentioned, as well as later by all counsel representing the proprietary lines, that the only thing necessary to be done was to change

the contract between the Proprietary Lines and the Terminal Association in the points specifically above pointed out. This being done, the operation of the Terminal properties could proceed as it always had been conducted.

This view was affirmed by the decree entered by the Circuit Judges. The Government contested this construction of the decree and insisted that the Terminal Association's right to charge for services rendered was completely abolished on all traffic destined to or from St. Louis, either from the east or west, and that there should be no discrimination in the charges on traffic made between St. Louis and East St. Louis and that the only charge which the Terminal Association had the right to make was one for switching after the point of destination of the traffic had been reached to a subterminal or side track of an industry located somewhere on the Terminal line. In order to enforce this view, it appealed to the Supreme Court of the United States. This case was there heard and determined against the contention of the Government. It was fully discussed upon all propositions involved and the view which I announced to you when the first decree was ordered was finally affirmed by the Supreme Court.

Before that matter was finally determined by the Supreme Court, it was determined by the Interstate Commerce Commission in a proceeding on the complaint of the Business Men's League of St. Louis, Pulitzer Publishing Company and others, in which reference was made to the decree of the Supreme Court first ordered. While the Commission was dealing in these complaints only with traffic destined from points east of East St. Louis to St. Louis, the propositions laid down apply equally to shipments west of St. Louis through St. Louis to East St. Louis. It was there said:

"With all these facts before us we are not prepared, on the general theory that the two com-

munities are one from a commercial point of view, to hold that they also form one community for transportation and rate-making purposes. On long-haul traffic the charges of the Terminal Association disappear in the through rate through the absorption of them by the line carriers as heretofore stated, their larger revenues on such traffic enabling this to be done. But we see of record no just basis for requiring the absorption by the line carriers of the charges of the Terminal Association on their short-haul traffic yielding much lower revenues. Whether the Terminal Association be considered as a separate entity or its rails simply an extension of the rails of the Proprietary Lines, thus making a one-line haul in some cases from these mines into St. Louis, no sufficient reasons are shown on this record for a finding that the St. Louis rate should not exceed the East St. Louis rate. Before dismissing this contention it is well to add that while the St. Louis interests earnestly pressed this view upon our consideration the *the* East St. Louis interests were also contending, no less vigorously, that that city is entitled to the natural advantage of its geographical location."

On the last appeal of the Government to the Supreme Court, that Court said:

"As the court below on this subject did nothing more than embody in its decree the provision of the mandate, the contention is that error was committed because the decree failed to expound the language of the mandate. Indeed in the argument it was insisted that to properly give effect to the mandate there should have been inserted in the decree an express provision absolutely controlling or regulating for the future charges which the Terminal Company might make. But to have given effect to this view would have caused the decree to be plainly repugnant to the provisions of the Act to regulate commerce and contrary to the exercise by the State authorities of their power over

charges of the Terminal Company in so far as the jurisdiction of such authorities may have extended. The flagrant repugnancy to the Act to Regulate Commerce which would have resulted if the decree as asked had been granted will become manifest when it is considered that the insistence was, as pointed out by the Court below in its opinion, that there should have been a provision in substance so fixing and perpetuating for the future rates on traffic coming into East St. Louis from the zone mentioned in the mandate as to compel the commodities transported to East St. Louis to be carried from there across the river to their point of destination in St. Louis without any transportation charge whatever—a direction which it is apparent would have involved, if given, a disregard not only of all the regulations concerning rates established under the Act to Regulate Commerce, but also, it may be, the prohibitions of that act concerning preference and discrimination. This condition is not escaped by the suggestion that such limitations if imposed would not have been in substance repugnant to the Act to Regulate Commerce, since, as the rate from which the repugnancy would arise would only apply to business done by the combination and as the combination would have to be dissolved because of the repugnancy, therefore the repugnancy would cease to exist from the very fact that it arose. But this argument only restates the contention concerning another aspect of the case which we have previously disposed of and serves to emphasize the view that it is impossible to conceive that the decision of this Court recognized the right of the Terminal Company to continue to exist provided certain features in its organization which were in conflict with the Anti-Trust Act were removed, and yet at the same time provided that when such features were removed the right to continue should be lost by the fact of its exercise. The particular expression of disapproval of

the form of rate stated in the clause relied upon could only have been based upon one of two conceptions: First, the intention if such a charge was attempted to be exacted under the future operation of the company which was permitted, to lay down a rule forbidding such a charge in the future by the Terminal Company and thereby expressing an opinion upon and controlling a subject plainly beyond the primary sphere of the judicial power and exclusively within the original cognizance of the Interstate Commerce Commission under the terms of the Act to Regulate Commerce; or, second, as there was contention in the record as to whether such a form of rate was charged, and if it was, as to its legality, the expressions on that subject were used only to exclude all inference that the judicial recognition of the right of the Terminal Company to continue in business on compliance with exactions which were required carried with it an implication of approval also to continue to exact the rate in question if it was being exacted, thus excluding all room for the contention that the provisions of the Act to Regulate Commerce were in any way interfered with. That the expressions relied upon did not have the right meaning and therefore solely had the second, so clearly results from the context of the mandate, that is, from its seventh paragraph, as to need no further consideration of the subject. The clause is as follows:

"Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission."

"Comprehensively considering and once again

weighing all the contentions pressed upon us by the United States, we are of the opinion they all in last analysis rest upon the following contradictory assumptions (*a*) that the decision of this Court destroyed one set of public rights upon the theory of protecting another set: (*b*) that it proposed to correct an abuse of one statute by conferring authority to violate another; (*c*) that while exerting the authority of enforcing one statute the power was assumed of setting aside the provisions of another statute. On the contrary, when the confusion upon which these views rest is disregarded we are of the opinion that the decision involved none of these contrarieties or conflicts since in the public interest and to open wide the avenues of commerce and make them free to the enjoyment of all, it commanded the correction of conditions impeding that result and which were in conflict with the Anti-Trust Act, thus bringing the assailed combination under the law of the land and leaving it to be controlled by such law."

All of the things criticised by the Supreme Court in the so-called Terminal combination have been eliminated from the contract between the Proprietary Lines and the Terminal Company and all the things required by the Supreme Court and ordered by the Circuit Court Judges have been done.

Neither the Supreme Court nor the District Court, in any manner, shape or form, undertook to fix, adjust or apportion the division of tariffs between the Terminal Association and the Proprietary Lines or direct the mode or manner in which it should be done. It had no jurisdiction of such matters and did not attempt to exercise any, as pointed out by the Chief Justice. Control of all such matters is by law vested in the Interstate Commerce Commission and so emphatically declared to be vested by the express declaration of the decree in the Terminal case and the last opinion of the Supreme Court.

I formerly have advised you that the Terminal

tariffs and concurrences should and must be filed with the Interstate Commerce Commission, as you have done, and as I assume you are still doing.

I therefore re-affirm the opinion which I have heretofore given you in this case, that you are now operating in complete harmony with the decree in the Terminal case.

Very truly yours, (Signed) H. S. Priest.'

The final decree has not been entered upon the mandate of the Supreme Court in its last decision, and Judge Priest will continue in charge of this case until the final decree is entered next December when the Circuit Judges come here." (Rec. 243-249.)

On September 28, 1914, the East Side Lines served the following notice on the West Side Lines through their officials:

"Referring to notice served on you by the undersigned under date August 17, 1914, to the effect that Mississippi River transfer charges on Trans-Mississippi River traffic would not be assumed:

This matter, having been discussed at meeting of eastern and western roads today, and no good and sufficient reasons advanced for a change in the existing arrangement which has been in effect for at least twenty-five years, in fact, ever since the present facilities for handling traffic through St. Louis and East St. Louis have been in existence, and under which the traffic has grown to its present volume and which were in no way changed with the establishment by eastern roads of St. Louis rates to satisfy the demands of the City of St. Louis for rates published specifically to and from St. Louis and which moreover could not be changed without involving other competitive gateways, including all Mississippi River crossings from Cairo to East Dubuque, inclusive, to say nothing of Ohio River and Potomac River crossings; also the fact that rates east and west

of the Mississippi River and north and south of the Ohio River, respectively, have been built on the basis of an east or north-bank interchange of through traffic, we, therefore, pursuant to instructions of our superior officers, reaffirm our notice of August 17, modified to the extent that we will accept and forward all shipments tendered but we will not advance charges in excess of those computed on your rates to East St. Louis as lawfully on file with the Interstate Commerce Commission, nor will we accept on prepaid traffic, prepaid charges less than those computed on the basis of our rates from East St. Louis to destination as lawfully on file with the Interstate Commerce Commission." (Rec. 250-251.)

Correspondence was introduced in evidence showing the ineffectual efforts of the West Side Lines to compel the East Side Lines and the Terminal Companies to change the tariffs, concurrences and division sheets then on file with the Interstate Commerce Commission. (Rec. 252-256.)

Columbus Haile, Chief Traffic Officer of the Missouri, Kansas & Texas Railway Company, testified that the tariffs, concurrences and division sheets of the West Side Lines, the East Side Lines and the Terminal Companies filed with the Interstate Commerce Commission required the West Side Lines to pay the charges of the Terminal Companies on a large portion of the through traffic passing through the St. Louis and East St. Louis gateways. (Rec. 257.)

Division circulars of the Terminal Companies were offered in evidence, and Division Circular No. 15 was shown as typical. (Rec. 258.)

Concurrences of the Terminal Companies showing them as participating carriers and various tariffs of the Terminal Companies on file with the Interstate

Commerce Commission were introduced in evidence. (Rec. 259-263.)

The witness further testified that the tariffs in which the Terminal Companies concur applied to a large portion of the traffic passing through the St. Louis gateway, and that the amount of charges of the Terminal Companies on its through traffic during the period of January, February and March, 1917, amounted to $77,921.87; that the Terminal Railroad Association issues both trip and annual passes which some roads require to be presented before the holder is allowed to board the train going beyond its lines; that the express tariff introduced in evidence covers express traffic received by the connecting lines from the Terminal Companies.

On cross-examination this witness testified that there was some through traffic moved to the East from St. Louis, to the West and South, on which the charges of the Terminal Companies are deducted before the revenues are pro-rated, and that:

> "The present method of division, and of breaking rates on the east bank, has been the practice for the past forty years with no material changes. Rates to and from St. Louis, as applied to traffic beyond the one hundred mile zone, became the same as the East St. Louis rate about 1906 or 1907, through an arrangement between the eastern roads and the Municipal Commission of St. Louis.
>
> About 1877, due to construction of the Alton Railroad, East St. Louis was given the same rate as St. Louis on traffic coming from the west, or originating in this territory and moving to the west. That road, in approaching St. Louis from the west, crossed the river at Louisiana, Missouri, and reached East St. Louis before it reached St. Louis, and the result was the application of St.

Louis rates to East St. Louis. Prior to that time the rates to East St. Louis on traffic from the west, were higher than the rates to St. Louis by the amount of the charge for transfer across the Mississippi River. When the rates became the same, it was necessary for somebody to take care of that additional charge, and as a matter of competition on the part of the western lines with the Chicago and Alton road, it was necessary for them to absorb that expense. The revenues of the eastern roads were not affected thereby and had nothing to do with the matter. That was the origin of the practice of making these rates break on the east side of the river. The practice has continued until the present without any change.

I think that the situation was altogether changed when the practice of making rates from the east to St. Louis higher than to East St. Louis ceased. There was then made possible through St. Louis, a combination of rates to and from the east that equalized the rates to and from East St. Louis. Previous to that time the only combination had been on East St. Louis.

Previous to the time when they applied the East St. Louis rates to St. Louis, the effect of the manner in which divisions were arranged was to throw the Terminal expense upon the western lines. The condition of competition at that time compelled the western lines to do it, and to a large degree that feature continues now.

The pass issued to me by the Terminal Railroad Association reads, 'Terminal Railroad Association of St. Louis, Pass, between all stations, until December 31, 1921.' It is endorsed on the back, 'Good over St. Louis Merchants Bridge Terminal Railway.' It will not be honored for transportation on any train outside of the territorial limits of the Terminal Railroad Association. I could use it on a trip that began and ended on the rails of the Terminal, say from St. Louis to

East St. Louis. I don't know that all of the railroads require the production of this pass. On one trip I was asked for the pass and afterwards the conductor said he did not have to have it, but I don't remember what road it was. With that exception I have been required to show it." (Rec. 264-265.)

The exact form of a Terminal pass, showing conditions on the front and back, was shown in evidence (Rec. 266-267.)

This witness further testified on cross-examination:

"In presenting to the Interstate Commerce Commission statistics for use in the investigation known as Ex parte 34 Advance Rates, 1920, indicating probable results to roads in the western territory as showing their need of revenue, according to my understanding, each road in reporting its earnings stated only the amount that it retained in its own treasury. If the M., K. & T., for instance, had paid out a certain sum for the expense of this transfer, that was not reported as revenue to the statistician who prepared that case.

The question of who shall pay the transfer does not arise on traffic which either originate in or is destined to the St. Louis zone. Our own rates and the east side rates apply there. It arises only on traffic from points beyond the zone to points beyond the zone.

Switching tariff 1-J I. C. C. 1319, issued by Leland contains switching rates into St. Louis territory which are, generally speaking, absorbed by whatever line haul carrier either brings the traffic in and delivers it to the Terminal or receives it from the Terminal. I think it is the sort of switching tariff ordinarily filed by Terminal Companies in other cities.

When the St. Louis combination governs the rate, the west side lines pay the transfer charges. The transfer is borne entirely by the west side

line, whether the rate makes on St. Louis or East St. Louis.

If, on traffic beyond the hundred mile zone, the St. Louis combination is lower than the East St. Louis combination, and determines the rate, and the west side line gets in full, the local to St. Louis and does not pay the Terminal, then I would say that the west side lines bear so much of the charges as brings the traffic to St. Louis, and the east side lines bear so much as takes it beyond St. Louis, but I do not think there is any such case.

On traffic within the hundred mile zone, where the St. Louis combination is lower and fixes the rate, I would say the west side lines bear so much of the charges as brings it to St. Louis, and the east side lines so much as takes it beyond. For instance, on all shipments originating on the M., K. & T. within a hundred miles of St. Louis and moving to New York, the combination is on St. Louis and my statement about the west side lines bearing the entire transfer charge would not apply." (Rec. 268-269.)

C. A. Vinnedge, Secretary and Auditor of the Terminal Railroad Association, testified that he prepared a statement setting forth his idea of the method of operation of the Terminal Companies, but when inspected by Terminal officials, including President McChesney, the document had been objected to as official. The document in question is set out in full in the record (Rec. 270-273), but was never presented to the Board of Directors of the Terminal Railroad Association, nor had official sanction, being only a memorandum of his impressions and ideas.

Joseph L. Power, Traffic Manager for the Simmons Hardware Company, identified a uniform bill of lading, prescribed by the Interstate Commerce Com-

mission, employed by his company when using the facilities of the Terminal Companies. (Rec. 274-277.)

On cross-examination this witness testified:

> "If a shipment was going to be made to some point on the Illinois Central we would not put the name of the Terminal Railroad in the bill of lading, but the name of the line-haul carrier. I accept the Terminal Railroad as the agent of the carrier." (Rec. 276.)

George L. Kerr, Traffic Manager of the Gardner Motor Company, also identified a uniform bill of lading used by his company, and on cross-examination testified that it was the contract of the line haul carrier, "and the Terminal Company acted simply as that carrier's agent. Our factories and warehouses are located on the rails of the Terminal and if it refused to sign these bills of lading we would have to go to the line haul carrier, which would involve considerable inconvenience to us and other business men of St. Louis." (Rec. 276-277.)

B. H. Fanning, Traffic Manager of the Chevrolet Motor Company, testified that his company printed blank bills of lading, one of which was identified and offered in evidence.

This witness, on cross-examination, testified that "the name of the Terminal does not appear in this bill of lading. S. R. Stevenson is the Terminal Agent at St. Louis. It is a matter of convenience to have the bills of lading signed out there where our plant is and that is why we go to the expense of having them printed for ourselves." (Rec. 277-278.)

C. E. Perkins, Vice-President in charge of traffic of the Missouri Pacific Railway Company, testified that

in the fall of 1914 a controversy arose between the East and West Side Lines and the Terminal Companies with reference to the payment of transfer charges on through freight moving through the St. Louis gateway, and that on September 8, 1914, he had written representatives of the East Side Lines as follows:

> "Subject: Absorption of Mississippi River transfer on traffic interchanged with eastern lines.
>
> This will acknowledge receipt of your letter of August 17th wherein you serve notice on the Missouri Pacific and other west side lines that you will not accept traffic originating on our line and destined to points on your line delivered to you through the Terminal Railroad Association where the through rates make on the St. Louis combination and accept in the division of such through rates your local rate from St. Louis.
>
> You further state that it was understood that when St. Louis rates to and from Central Freight Association, Trunk Line and New England territories were published in response to demands of St. Louis commercial interests that the Trans-Mississippi traffic would be continued to be handled on the East St. Louis basis. I should be very glad indeed to be furnished with any evidence which you may have that the Missouri Pacific Railway was a party to any such understanding.
>
> While we dislike extremely to have any controversy or misunderstanding with our connections we feel that the position taken by your lines is now and has been for some time past extremely unreasonable and we now beg to advise you that effective at once on through east-bound traffic where rates are on the St. Louis combination we will exact our local rate to St. Louis and shall expect you to accept your local published rate from St. Louis to destination." (Rec. 278-280.)

That Traffic Manager Stith of the Terminal Companies, on September 10, 1914, had written him as follows:

> "We have carbon copy of your joint letter of September 8th to East Side roads, in reply to notice served by them August 17th. We note that it is the intention of the Missouri Pacific Railway to bill eastbound traffic at St. Louis locals in cases where through rates may make on both the East St. Louis and St. Louis combinations, and as this will result in shipments being rejected by Eastern roads we wish to call attention to our advice of August 19th, wherein we stated that promptly upon rejection of such shipments by our Eastern connections, they will be returned to the lines from which received with all charges following." (Rec. 280-281.)

This witness showed that a controversy had existed between the East and West Side Lines over the payment of the charges of the Terminal Companies for many years, but that neither the traffic men nor the executives were ever able to adjust their differences, and that on practically all through business at the St. Louis gateway the West Side Lines, including the Missouri Pacific Railway Company, were compelled to pay the charges of the Terminal Companies since the rate broke on the east bank of the Mississippi River. (Rec. 283.)

On cross-examination this witness stated that the whole matter involved in the controversy was the division of a rate and that the public was not concerned. (Rec. 284-285):

> "Q. The real controversy as you understand it is how and in what way you shall divide up the Terminal charge, isn't it? A. The real controversy, so far as the Traffic Department is concerned, and that end I have been handling, is who

shall pay for the service rendered from one side of the river to the other side of the river.

Q. Somebody has to pay, hasn't it; that is evident, isn't it? A. I should say so.

Q. The Terminal does the work, and somebody has to pay the Terminal. A. In some shape or form.

Q. So, as you understand this, it is a question as to who shall pay? A. It may be as a division or it may be on a cost basis; however, that may be determined, but there is a service there that somebody should pay for, and we have been paying all the bills.

"Q. It don't make any difference to the shipper who pays for it? A. Not at all.

Q. So the public is not concerned in this controversy. A. No." (Rec. 286.)

W. H. Malcolm, Auditor of Freight Receipts for the Missouri Pacific Railroad Company, testified that he had made some figures with reference to the amount of transfer charges on through freight moving East and West through the St. Louis Terminal paid for the three months, January, February and March, 1917, by the Missouri Pacific, which amounted during that period to $154,357.44. (Rec. 286-287.)

This witness identified some uniform bills of lading which were offered in evidence, in which the name of the Terminal Railroad Association appeared, and said:

"These are shippers' order bills of lading. They are surrendered to the agent at the destination, and under our plan of handling they came in to the Auditor of the Missouri Pacific for file. The Terminal signed them originally, but the Missouri Pacific was the destination line. I presume these bills of lading were filled in by the shippers themselves, and that the words 'Terminal Railroad

Association' at the top, were filled in by the shipper.'' (Rec. 288.)

H. C. Abbey, Auditor of Station Accounts for the Missouri Pacific Railroad, testified that he had investigated some of the transfer charges paid by the Missouri Pacific on through freight moving East and West through the St. Louis Terminal, and for the month of December, 1920, the Missouri Pacific paid $47,571.90. (Rec. 289.)

This witness, on cross-examination, testified that the $47,571.90 covered only that portion of the transfer charges on through freight originating beyond St. Louis and going beyond East St. Louis and moved on through waybills from points of origin to points of destination. (Rec. 292.)

TESTIMONY FOR EAST SIDE LINES AND TERMINAL COMPANIES

W. C. Stith, Traffic Manager of the Terminal Companies, testified that the Terminal Companies had contracted with the Government for the operation of their properties during Federal Control based on a certificate of the Interstate Commerce Commission to the President of the United States setting out the average annual railroad operating income of the companies computed in the manner provided in Section One of the Federal Control Act, and that the figures were derived from the earnings during the test period of three years, 1915, 1916, 1917, resulting from the use of rates provided in the tariffs and division circulars of the companies issued in conformity with the rules of the Interstate Commerce Commission and the Public Utility Commissions of Missouri and Illi-

nois; that the guarantee of the Government for the period, March 1 to August 31, 1920, as provided by the Transportation Act of 1920, was accepted then and the compensation paid was computed in the same manner as provided in Section One of the Transportation Act; that the contract of the Terminal Companies with the Government for the use of their properties during Federal Control, and the acceptance of the guarantee provision of the Transportation Act of 1920 was directed, authorized, ratified and approved by the unanimous votes of the directors and stockholders of the Terminal Companies, representing both the West Side Lines and the East Side Lines.

The minutes of the Board of Directors and stockholders of the Terminal Companies, forms of contracts with the Government for the use of the Terminal properties during Federal Control, and the acceptance of the guarantee provision of the Transportation Act of 1920, were offered in evidence. (Rec. 292 et seq.)

This witness testified as follows:

> "During the period of Federal Control the same charges, except where advanced by proper authority of the United States Railroad Administration were made against the East and West Side Lines as were in effect prior to that period. They were paid through substantially the same method, namely, Auditor's Settlement under through billing and Agents' Settlement when billed to junctions, the same parties paying the same class of charges as before Federal Control. Increases in rates during that period were made only upon authority of the United States Railroad Administration either through the regular constituted rate committees or the Traffic Assistant to the Regional Director, the Traffic Committee taking up the questions in which the public was directly interested and the

Traffic Assistant taking up the question of distribution of earnings between the roads. Increases that were authorized through either of these channels were issued in the same manner during the period of Federal Control as prior to that time." (Rec. 328.)

This witness then gave the following testimony as showing why and under what conditions these Terminal Companies file their concurrences and tariffs with the Interstate Commerce Commission:

"Prior to the amendment of the Elkins' Act, passed June 29th, 1906, the filing of concurrences by participants in joint freight tariffs applying on interstate traffic was not given much attention by the carriers, nor was it checked up closely by the Commission. At that time I was Freight Traffic Manager of the Missouri Pacific Railroad. The records of the Terminal Association show, however, that we were issuing concurrences at that time, and had been doing so as far back as 1904. The amendment to the Elkins Act referred to, included severe penalties for violation of the rules of the Commission, one set of which specifically prescribe the form and contents of the various kinds of concurrences required to be filed. In August, 1906, the Commission was asked if, under the amended law, it was necessary to file concurrences to cover each and every tariff published by each road, to which we were a party, or that we might file a general concurrence to cover all. We were advised August 9, 1906, by the Commission that they had accepted general certificates of concurrences from carriers, specifying the form of such concurrence and that until the Commission had taken action under the new law, they would accept such certificate of concurrence from us to cover all joint tariffs of other lines to which we were a party.

Effective May 1, 1907, regulations were issued governing the construction and filing of freight

tariffs and providing therein forms and concurrences to be used.

In the Fall of 1908 and early in 1909, much correspondence was had with Commission about the publication of tariff indices and the posting of tariffs. Early in 1909, Chairman Fraser of the St. Louis Eastbound Freight Committee, was advised by the Terminal Railroad Association, that it desired to revoke concurrences in all freight rate schedules and to publish in lieu thereof a local tariff, including therein all charges for the freight service performed by them for the railroad. This was not objectionable to the carrier lines, provided it did not render impossible the publication under the rules of the Interstate Commerce Commission of Through Rates from and to St. Louis which at that time were published under concurrences of the Terminal Railroad Association.

Upon this question Commissioner Clark wrote Chairman Fraser, under date of May 12th, 1909:

'I am authorized to say that in the opinion of the Commission it would not be proper or lawful for the lines which you represent to publish through rates to and from St. Louis without the proper concurrence of the Terminal line, which performs the service between St. Louis and East St. Louis. The Commission will shortly issue a comprehensive expression of its views or a rule covering and defining the instances in which a terminal or switching road must, and the instances in which it need not, concur in through tariffs.'

Following this correspondence, representatives of the Terminal Railroad Association visited Washington for conference with the Commission, not only with a view to being relieved of issuing indices for all the tariffs that we were a party to, and to secure modified rules as to posting tariffs, but also to be relieved from issuing concurrences. The outcome of these conferences was

that early in 1909, the Terminal Railroad Association was permitted to issue indices only for the tariffs which it issued, but was not required to issue indices for tariffs it concurred in; the posting rules were modified to some extent, but the Terminal Railroad Association was required to continue the practice of issuing concurrences to cover all joint freight tariffs to which its lines were a party. Such concurrences conforming to the rules of the Commission were issued." (Rec. 334-335.)

Correspondence with the Interstate Commerce Commission was introduced in evidence showing that the management of the Terminal Companies had always been eager and willing to conform to the rules, regulations and requirements of the Interstate Commerce Commission. (Rec. 335-338.)

This witness testified:

"The Terminal Railroad Association and its subsidiaries have never had a form of bill of lading but they have always had, and still have, a simple form of dray ticket, form No. 15, a copy of which I will file in due course. The employes who are authorized to sign receipts for freight are receiving clerks at the freight station, 12th and Poplar streets, the number varying with the volume of business and sometimes reaching as high as ten; the yard clerks in the different districts on both sides of the river, there being some 40 separate places where such receipts are signed, and in some instances where, as in the case of the outlying Belt districts, the foreman of the switching crew is authorized to sign receipts for freight, carloads. There are approximately one hundred employes who perform the function of signing receipts for freight." (Rec. 339.)

A form of dray ticket authorized to be used by the Terminal Companies showed that goods were

received from the shipper "subject to the rules and conditions as printed in the bill of lading of the railroad company." (Rec. 340.)

This witness testified:

> "The use of the uniform bill of lading has been a great convenience to the shipper and a matter of both convenience and economy to the railroads. Regardless of the form in which the receipt for property has been given, the service which the Association has rendered on shipments to connecting lines has been solely and alone a terminal service. The character of the receipt has not changed, and apparently cannot change, the character of the service rendered nor does it any way affect the responsibility of the Association to either the owner of the property or the connecting line for which it performs terminal service.
>
> The practice of the Terminal Railroad Association and its subsidiaries to publish only and exclusively its own tariff which applies between points on its own rails. It does not initiate or publish any tariffs of any character whatsoever to points beyond its own rails. The Terminal Railroad Association and its subsidiaries are not represented on any Tariff Committee or similar organization." (Rec. 341-342.)

This witness then described how the compensation of the Terminal Companies is fixed for their services performed for the trunk line railroads using their facilities, as follows:

> "The compensation is fixed by the same tariff of rates and governed by the rules and regulations as are applied in case of the Proprietary Lines. As to freight traffic, in cases where the charge of the Terminal Railroad Association is for switch service, either on the west side of the river or on the east side of the river, and is included in the absorption rules of connecting carriers, its com-

pensation is set out in the tariff published for convenience of all the switch lines by Agent Leland, the current number being I-J, I. C. C. No. 1319.

In cases where the Terminal Railroad Association is shown as participating carrier in through rates either to or from St. Louis or East St. Louis, the proportion accruing to the Terminal is set out in a Division Circular which is issued by the Terminal, the present number being 15.

On any traffic which moves wholly within the switching district, the charges are set forth in Terminal Railroad Association Tariff 23-J, I. C. C. No. 114. The rates fixed in the Leland Tariff, in the Division sheet, division circular, and in Tariff 23-J referred to, apply alike on traffic to or from Non-Proprietary Lines and Proprietary Lines. The passenger, mail and express matters will be specifically covered. The Terminal Railroad Association is operated under a guarantee agreement with the Proprietary Lines, which assures its fixed charges and operating expenses. Its earnings are derived from Proprietary and Non-Proprietary Lines alike, and from the public through its present methods, under which it seeks to obtain sufficient funds from the operation of the properties to enable it to meet currently all its obligations; to keep the physical property up to the standard necessary to meet at all times the service demanded of it by user lines as well as by the public; and at the same time distribute this expense in a fair manner between all users. The existing method has been in use a number of years, during which period no call has been made upon Proprietary Lines under the guarantee to make good any deficit.

It has always been considered that fixing the compensation of the association upon a classified basis, resulted in the most equitable adjustment to all parties concerned. It does not involve the question who shall pay, nor does it in any way af-

> fect or change the service which the Association is called upon to render as a Terminal Company, but simply states a basis for fixing its compensation upon the most practical basis, all the circumstances considered that has been found adequate to meet the situation." (Rec. 342-343.)

This witness then testified that the Terminal Companies own and operate some 184 engines, but they own no freight or passenger cars; that the yards on the east side of the Mississippi River have a 10,473-car capacity, and the yards on the west side a 5,526-car capacity. (Rec. 343.)

This witness then described in detail how the Terminal Companies, as provided in their operating agreement with the Proprietary Lines of October 1, 1889 (Rec. 133), and the supplemental agreement of January 16, 1903 (Rec. 162), handled the freight, passenger, express and mail business of all railroads, Proprietary and Non-Proprietary, and performed terminal service for them on both sides of the Mississippi River in the St. Louis and East St. Louis switching districts, as well as trans-Mississippi service over the bridges. (Rec. 343-345.)

This witness then explained how the Terminal Companies sold tickets to passengers traveling in all directions out of St. Louis as the agent for all the railroads, Proprietary and Non-Proprietary, carrying passengers in and out of St. Louis; that the entire expense of maintaining this ticket office being apportioned upon a user basis among the railroads for whose exclusive benefit the tickets are sold; that they sell a form of ticket for account of the connecting railroad from St. Louis, Union Station and Third and Washington Avenue, St. Louis; that in 1919, 577,713 passenger cars were handled in and out of Union Station,

and 88,955 trains; the average number of cars per day was 1,583, and the average number of trains was 244. (Rec. 345.)

Passenger tariffs covering the service originating and ending on the lines of the Terminal Companies in St. Louis and East St. Louis were put in evidence. (Rec. 345.)

Tariffs showing how express business of the Terminal Companies was handled in connection with the trunk line railroads were put in evidence. (Rec. 345.)

The joint time table of the Terminal Companies, covering passenger business handled over its lines was put in evidence, as well as forms of railroad tickets and baggage coupons. (Rec. 348.)

This witness testified that the Terminal Companies serve fourteen Proprietary Lines and sixteen Non-Proprietary Lines, thirteen on the East Side and three on the West Side. (Rec. 349.)

As showing the scope and range of the activities and services of the Terminal Companies, and how they had always been treated by the Government and the Interstate Commerce Commission, this witness testified as follows:

> "The rails of these Terminal Companies and their facilities are the only practical means by which these Non-Proprietary Lines, as common carriers, can engage in interstate commerce between Missouri and Illinois, or have their traffic carried across the Mississippi River at this gateway. These Terminal Companies and their subsidiaries carried over their bridges and with their ferries in 1917 for the Proprietary and Non-Proprietary Lines the following number of cars and tons of freight:
>
> East Bound, from Proprietary Lines, 307,938 cars or 72.3 per cent and 6,566,472 tons or 73 per

cent; Non-Proprietary Lines, cars 85249, per cent 27.7, tons 1,775,100, per cent 27.

West Bound, proprietary lines, cars 277,311, per cent 67.6, tons 7,126,748, per cent 61.7; Non-Proprietary Lines, cars 132,878, per cent 32.4, tons 4,411,633, per cent 38.3.

This statement includes all of the Proprietary Lines and only ten Non-Proprietary Lines.

A statement covering the movement of Illinois bituminous coal into East St. Louis, Illinois, and St. Louis, Missouri, and beyond through St. Louis, shows that this tonnage was made up, for the periods stated, as follows:

From Proprietary Lines in 1915, 59 per cent; 1916, 57 per cent; 1917, 50 per cent.

From the Non-Proprietary Lines in 1915, 41 per cent; 1916, 43 per cent; 1917, 50 per cent.

For the year 1917 this Illinois bituminous tonnage amounted to 9,403,366 tons.

The commercial coal hauled by these Non-Proprietary Lines from the mines in Illinois and delivered through the facilities of these Terminal Companies to industries in St. Louis are as follows:

1915, 876,733 tons or 60 per cent; 1916, 1,012,387 tons or 59 per cent; 1917, 1,099,037 tons or 63 per cent.

The hauling and carrying of the freight and passenger traffic for these Non-Proprietary Lines is required of these Terminal Companies and their subsidiaries by the Interstate Commerce Commission and by the State Commissions of Missouri and Illinois, and if the contention of the petitioners be sustained, and that these Terminal Companies and their subsidiaries should be restricted or prohibited in their activities as common carriers the Non-Proprietary Lines would be without terminal facilities and without any means of having their traffic, so essential to the commercial and industrial life of this community, carried across the Mississippi River. Such a result would

bring about an intolerable situation and commerce between the States of Illinois and Missouri, which should be encouraged and promoted, would be throttled and paralyzed.

These Terminal Companies have at all times been treated by the Government of the United States as common carriers, and these Terminal properties were taken over by the Government and operated during Federal control by the United States Railroad Administration as common carriers under the provisions of the Federal Control Act. Each of these Terminal Companies contracted with the Government for the use of their properties during Federal control, and executed the standard form of contract, as did other common carriers. The United States Railroad Administration during the entire period of Federal control operated these Terminal properties according to the same practices and methods and in the same manner as they are now being operated.

During Federal control the United States Railroad Administration dealt with these Terminal companies as separate corporate entities and as common carriers subject to the provisions of the Federal Control Act, and advanced them funds from time to time to meet their corporate obligations, and determined their just compensation upon a basis of their earnings during test period according to reports filed by these Terminal Companies as common carriers with the Interstate Commerce Commission. The Interstate Commerce Commission, the United States Treasury Department and the United States Railroad Administration have dealt with these Terminal Companies during the guaranty period as common carriers and subject to the provisions of the Transportation Act of 1920, which were accepted by these Terminal Companies. These Terminal Companies have made application to the Interstate Commerce Commission as common carriers for

loans to meet maturing corporate debts, to be reimbursed for deficits arising from operations during the guaranty period, and to make necessary additions and betterments to their properties, and such applications have been granted and payments authorized by the Interstate Commerce Commission and the funds so authorized have been paid through the Treasury Department of the United States to these Terminal Companies.

I have been connected with the Terminal Railroad Association as its Traffic Manager since June 1, 1914, during which period the rates which have been published to and from the East on through business have applied to and from the east bank of the river.

The status of the Terminal Railroad Association before the Interstate Commerce Commission was passed on by that body under a decision dated January 29, 1915, 32 I. C. C., involving I. & S. Docket No. 237, Illinois-St. Louis Coal rates and Docket 566, Lumaghi Coal Company et al v. Baltimore & Ohio Southwestern Railroad Company, et al.; Docket 5698, Business Men's League of St. Louis v. Baltimore & Ohio Southwestern Railroad Company et al., and Docket 5698 (Sub-No.) Pulitzer Publishing Company v. Baltimore & Ohio Southwestern Railroad Company et al., this being known as the Illinois-St. Louis Coal Rate Case; and under a decision in I. C. C. Docket 10997, decided May 11, 1920, 57 I. C. C. St. Louis Chamber of Commerce v. Baltimore & Ohio Railroad Company, Director General et al., involving rates on coal from mines in Illinois and Indiana to St. Louis." (Rec. 349-351.)

This witness filed as part of his testimony copies of contracts between the Director General of Railroads and these Terminal Companies, covering the operations of their properties during Federal Control. (Rec. 352-414.)

On cross-examination the witness testified that where the bridges are used on through traffic the Terminal Companies make a charge for use of the facilities on a basis of the division of the rate, and the use of the tunnel is merged in with the charge of the bridges; also, incidental trackage facilities outside of the Union Station proper is used in connection with the handling of through freight; that the passenger business which goes over the bridges is charged for on a per car basis according to the class of equipment when it has passed beyond Union Station proper; that the Terminal Companies make a charge against the trunk line railroads for hauling passenger cars over their bridges and lines, and they also make a charge upon a per car basis to reimburse themselves for the expense of operating the Union Station; that the charge for handling passenger cars was originally based on the actual number of passengers carried in a car during a ten-year period, and the unit of charge at present is on that basis, except it is considerably larger due to various increases; that the West Side Lines have never made any objection to the basis of the division of rates, but their objection has been to the distribution of the charges of the Terminal Companies and their apportionment between the East Side Lines and the West Side Lines; that during Federal Control the method of assessing charges and distributing the charges of the Terminal Companies was the same as before and after Federal Control. (Rec. 442-444.)

A statement showing the local and through freight traffic on cars handled by the Terminal Companies, and the revenue produced during the months of March and September, 1920, was shown by the evidence as follows:

"March, 1920:

	Cars	Revenue
Local	3,489	$ 25,881.19
Through	127,963	957,233.17
September, 1920:		
Local	3,245	31,134.33
Through	116,113	1,152,940.19

This statement is compiled by picking out the local cars, namely, those which had origin and destination exclusively on the rails of these companies, and the revenue thereon.

The through traffic was obtained by deducting the local from the total movement of cars and revenue therefrom.

All of the freight business of the Terminal is included in the two classes, through and local. No passenger business is covered by the statement." (Rec. 445.)

The salaries paid the various officials and agents of the Terminal Companies were introduced in evidence. (Rec. 446-448.)

On re-direct examination this witness testified as follows:

> "The Terminal does not originate, or have anything to do with the publication of tariffs, except the one it publishes, 23-J, covering business originating on, moving only over, its own rails. That tariff is the Leland Switching Tariff. The publication and compilation of other tariffs in which the Terminal concurs is done by some one else. It has nothing to do with the making and establishing of rates except the rates that begin and end on its own rails." (Rec. 449.)

On re-cross examination this witness testified as follows:

> "When I say that the Terminal has nothing to do with originating or establishing rates on traf-

fic, except on its own lines, I refer to the rates themselves and not merely to the printing of the tariff.

We actually printed and distributed from our own office the tariffs covering local traffic. We do the compilation work, fill in the rates, make the form, and furnish to Mr. Leland the figures that he is to put in his switching tariff covering this business.

Mr. Leland publishes the tariff that covers the switching rates of all lines on the East Side and on the West Side of the River that perform switching service. For instance, covering traffic moving from C. F. A. territory to Kansas, Oklahoma, Arkansas, Louisiana and Texas. The Terminal Association files with Mr. Leland concurrences to those tariffs and to all the tariffs that Leland files in which it is shown as a participating carrier. The same thing is true of similar tariffs published by Boyd, who is Agent, or Chairman, of the Western Trunk Lines Bureau, located at Chicago. These tariffs cover traffic originating and moving all over the United States when it moves through the St. Louis gateway." (Rec. 449.)

Again on re-redirect examination this witness testified as follows:

"The Terminal Railroad Association has nothing whatever to do with the amount of the rates that Leland, as Agent, publishes from C. F. A. territory to Kansas City, nor does Mr. Leland or any of the carriers consult the Terminal with respect to what the amount of those rates shall be. The Terminal Railroad Association has no voice whatever in the making of the through rates in the tariff published by Mr. Leland, as Agent, or Boyd, as Agent.

If, for instance, the Missouri Pacific, with respect to whose rates the Terminal Railroad Association has on file concurrences, proposed to make

rates from East St. Louis to Kansas City, it would not, on account of the concurrences, consult the Terminal as to what the amount of the rate should be. If they wanted to secure a modified division of the rate, they might consult us, but we would not have anything to do with fixing the total amount of the rate. We couldn't control that if we wanted to." (Rec. 449.)

Then on re-recross examination this witness testified as follows:

"The amount we shall receive out of the through rate is determined by division sheets agreed to a good many years ago. We originally suggested them and they were concurred in by lines, both East Side and West Side. We went to the division basis along in 1906 or 1907." (Rec. 450.)

This witness further testified that the names of the Terminal Companies were inserted in the bills of lading just offered in evidence by the shippers themselves and were signed "without my knowledge and consent and contrary to my instructions," as Traffic Manager of the Terminal Railroad Association, and that the Terminal Companies did not print the form used in these bills of lading and had nothing to do with their issuance. (Rec. 451-452.)

W. C. Maxwell, Vice-President in charge of traffic of the Wabash Railroad Company, testified that for nearly forty years he had been in constant touch with the method of rate making and the consideration that Mississippi River tolls were given in the making of rates. He offered in evidence a map which pictorially showed in colors five sections of the United States which were concerned with the present rate structure involved in this case. (Rec. 415.)

He explained how, in 1877, the West Side Lines, for competitive reasons, had voluntarily agreed with the East Side Lines, on the division of rates whereby the East and Westbound rates on through freight business broke at East St. Louis on the East Side of the Mississippi River, and that the West Side Lines, since 1877, had voluntarily assumed out of the through rates paid by the public the transfer charges of the Terminal Companies on westbound through business, but he explained that these Terminal charges paid by the West Side Lines were not paid on all westbound business, and he specified the exceptions. This witness testified as follows:

> "In 1877, or even back to April 13, 1876, the rates between East St. Louis and Trunk Line territory, and east thereof, that is this green territory, were based on 116 per cent of the rates Chicago to New York or between those points. The bridge tolls, when the freight came to St. Louis or went beyond, were added to the rate up to East St. Louis or from East St. Louis on any traffic that came to St. Louis or any point beyond, west thereof.
>
> In 1877, when the Chicago and Alton completed its bridge at Louisiana, Missouri, it entered the traffic between St. Louis via Louisiana, Missouri, and all points west, thus establishing the St. Louis rates between East St. Louis and points west of St. Louis with the exception of a small portion of nearby territory, west of the Mississippi River. All other western roads at St. Louis voluntarily met the action of the Chicago and Alton. Thus all roads established between East St. Louis and all points west the St. Louis basis of rates and that basis is still in effect today.
>
> The conditions since 1877 have been that the Eastern roads have made their rates on traffic to and from Trunk Line territory and east therof,

to and from East St. Louis on the basis of 116 per cent of the rate from Chicago to New York. That has remained unchanged to this day except that the basis was changed from 116 to 117 per cent in 1908. The conditions as to the Western roads under which St. Louis rates were made voluntarily by them to and from East St. Louis have remained unchanged to this day, both sections of the roads knowing exactly what they had to do. Since 1877 they had to make the rates so as to take care of the expense to and from East St. Louis, not St. Louis. There is one exception, the Pacific Coast traffic, that is, traffic between the green territory and the Pacific Coast. The divisions were arranged by agreement via Chicago, via Peoria, via East St. Louis and all East Bank Mississippi River points, also via every junction that was passed through, even down to New Orleans and Memphis, and the divisions were fixed with relation to the haul of the eastern roads. In dividing these rates, two cents a hundred is deducted from the proportion west of the Mississippi River for this bridge transfer. Deducted at St. Louis, deducted at Hannibal, deducted at every bridge that is crossed. It is set aside and the roads clear to the Pacific Coast join in the payment of the bridge tolls. It is taken out of the earnings west of the Mississippi River and all join in it.

Prior to 1887 the rates of the Eastern roads were made to and from East St. Louis only, the bridge tolls being added on traffic to and from St. Louis and beyond. In 1877, the Chicago and Alton completed its bridge at Louisiana, and entered into the traffic between St. Louis and points west thereof, via East St. Louis and Louisiana, thus establishing St. Louis rates between East St. Louis and points west of the Mississippi River, with the exception of the nearby territory west of St. Louis, small zone. Other western roads voluntarily met the action of

the Chicago and Alton, thus establishing the St. Louis rates between East St. Louis and points west of St. Louis. The practice has remained unchanged to this day. The rates of the eastern roads to and from East St. Louis were extended to all east bank Mississippi River points, so far as through traffic is concerned. I am talking only of through traffic. As far north as East Dubuque, it being the understanding during all of the years since 1877 that the Eastern roads had no interest in the bridge tolls on through traffic at any of the Mississippi River crossings and they made no provisions for such bridge tolls in the rates. The Western roads recognized that the interchange point since 1877 was at the east bank, that means East St. Louis and every other crossing up to East Dubuque, and they made their rates with the clear knowledge that their rates were to provide for the expense of the bridge service at St. Louis and every crossing as far north as Dubuque.

The only exception is the Pacific Coast Traffic, which has been explained.

The situation is the same as to Trunk Line territory and we get the money whatever bridge it crosses over, whether it is Hannibal or St. Louis or Burlington or any of them.

One other exception. Central Freight Association territory to Texas. The rates were originally made on differentials over East St. Louis, the Eastern lines being accorded their local rates up to East St. Louis, recognizing that as the interchange point and that our local rates applied on that traffic. There are no further exceptions." (Rec. 416-418.)

This witness further testified that, while the Chicago and Alton Railroad in 1877 had caused the West Side Lines to pay the Terminal charges for competitive reasons, at present the Cotton Belt is in the same position for handling Westbound business as the Chi-

cago and Alton, and handles freight to Texas without crossing the bridges at St. Louis, so that "if the Frisco or Missouri, Kansas and Texas want this traffic at St. Louis it is manifest they should meet the situation as to bridge tolls." (Rec. 419.)

This witness testified that on traffic within the one hundred mile zone, designated No. 5 on the map, the bridge tolls are added. This covers the great bituminous coal trafffic. Rates to St. Louis were formerly twenty cents higher than to East St. Louis. The difference is now thirty-five cents. The difference is collected from the public and paid by the East Side Lines to the Terminal Companies. The West Side Lines do not have anything to do with it. There is no reason why the East Side Lines should pay the Terminal Companies twice since they collect the transfer charges, take them out of the rate and give what is left to the East Side lines.

This witness further testified:

> "It must be borne in mind that if the Eastern roads are to pay the bridge tolls at East St. Louis on traffic interchanged with the Western roads, they would necessarily be obliged to pay them at every crossing, Alton to East Dubuque, despite the fact that the bridge toll had already been collected by the Western roads from the Public in the rates they made up to the East bank.
>
> That would apply to all Mississippi River crossings, East St. Louis and those north. The bridges north of Alton are owned or controlled by the roads operating over them. Over 80 per cent of the traffic that crosses these bridges, freight, passenger, mail and express, is traffic other than that interchanged with Eastern roads, and on such traffic, for instance, from Iowa to Chicago, or the Missouri River to Chicago, their rates are made to sustain the investment and service over the bridges.

In case of traffic handled by Western roads over these bridges to and from the Eastern territory, the rates, as stated, west of the Mississippi River are made to the East Bank, also to sustain the investment and service over these bridges by the Western roads. If the tolls for bridge service are first collected from the public by the Western roads through their rates on all traffic, and again from the Eastern roads on Eastern traffic, the Eastern roads would be called upon to sustain the investment and service for such bridges for which they have made no collection from the public in their rates, and despite the fact that such traffic would have already yielded the Western roads in their rate sufficient to cover the bridge service.

If the Eastern roads are forced to pay bridge toll, they would either have to shrink their revenues, which they cannot afford to do, or increase the rates, which is a matter for the Interstate Commerce Commission to decide. In fact, the whole matter is simply one of a passing point for rates and matter of divisions covered by practice since 1877. Now, as the rate, divisions and revenues of the carriers under the Transportation Act are under the control of the Interstate Commerce Commission, the whole question is one that comes within the jurisdiction of that body." (Rec. 420-421.)

This witness then testified that in 1920 there were proceedings brought before the Interstate Commerce Commission by the carriers asking a general increase in rates and revenues, known as "Ex Parte 74, Advance Rates 1920;" that both the East Side Lines and the West Side Lines in determining their revenue reported to the Commission, for use in this case, money paid to the Terminal Companies as expense and not as revenue, and that

"as these payments for services of the Terminal were deducted from the revenue of both the Eastern and Western roads, they did not enter into the showing of either of those roads. Thus the needs of the Western roads to produce the necessary 6% were measured by the revenue retained by them after their payment of what they claim is a greater part of the River transfer, and increases necessary to make their revenues yield 6% were awarded. Likewise the necessities of the Eastern roads were based on their revenues, after the deduction of a small part of the cost of the River transfer paid by them, and they were awarded increases sufficient to bring their revenue up to 6%. If the cost of the River transfer be now shifted by the Court, it will result that the Western carriers will get much more than the increases awarded to them in Ex Parte 74, and the Eastern carriers will get less." (Rec. 421-422.)

C. B. Sudborough, Traffic Manager of the Southwestern Region, Pennsylvania System, testified that he had had twenty-four years' experience in the railroad business in various capacities, all of them connected with the Freight Traffic Department, and that he had become familiar with the making of rates to and from the Mississippi River, and the method and manner of the division of those rates and the payment of bridge tolls.

This witness then gave a historical statement showing the origin and the causes of the establishment of the present rate structure at St. Louis and East St. Louis whereby the rates break on the East bank of the River on all through traffic, as follows:

"Originally the rails of the railroads operating westwardly from the Mississippi River terminated on the west bank at St. Louis, Mo., while the rails

of the railroads operating eastwardly from the Mississippi River terminated on the east bank at East St. Louis, Illinois. There was no physical connection between the rails of the roads terminating at East St. Louis, Illinois, and the rails of the roads terminating at St. Louis, Missouri.

Traffic originating east of the Mississippi River and consigned to St. Louis, Missouri, proper or to points west thereof had to be unloaded at East St. Louis and hauled in wagons transported on ferry boats across the Mississippi River to St. Louis, Missouri, where it was delivered either to the consignee or to the west side line which was to carry it on to destination. Conversely, freight originating west of the Mississippi River and consigned to East St. Louis, Illinois, proper, or to points east thereof, had to be unloaded at St. Louis, Missouri, and hauled in wagons likewise transported across the Mississippi River to East St. Louis, Illinois, where it was delivered either to the consignee or to the east side line which was to carry it on to destination.

No joint through rates were published from points east of the Mississippi River to St. Louis, Missouri, or to points west thereof and no joint through rates were published from points west of the Mississippi River to East St. Louis or points east thereof. The rates from points east of the Mississippi River were made to St. Louis, Missouri, by adding to the rates specifically published to East St. Louis, Illinois, the charge for hauling and transporting such freight across the river from East St. Louis, Illinois, to St. Louis, Missouri; and the rates to points west of the Missouri River beyond St. Louis, Missouri, were made by adding to the rates specifically published to East St. Louis, Illinois:

(1) The cost of hauling and transporting the freight from depots of the eastern lines terminating in East St. Louis, Illinois, to the depots of

the western lines terminating in St. Louis, Missouri; and

(2) The rate specifically published by the western lines from St. Louis, Missouri, to points of destination west thereof.

Conversely, the rates from points west of the Mississippi River were made to East St. Louis, Illinois, by adding to the rates specifically published to St. Louis, Missouri, the charge for hauling and transporting such freight across the river from St. Louis, Missouri.

Neither the introduction of the Car Ferry nor the completion of ? Mississippi River beyond East St. Louis, Illinois, were made by adding to the rates specifically published to St. Louis, Missouri:

(1) The cost of hauling and transporting the freight from depots of the western lines terminating in St. Louis, Missouri, to the depots of the eastern lines terminating in East St. Louis, Illinois; and

(2) The rate specifically published by the eastern lines from East St. Louis, Illinois, to points of destination east thereof.

In 1870 ferry boats suitable for transporting loaded and empty freight cars across the Mississippi River were first put in operation by the Wiggins Ferry Company.

In July, 1874, the bridge commonly called the "Eads Bridge" across the Mississippi River between East St. Louis, Illinois, and St. Louis, Missouri, was completed and put in operation, thus affording for the first time a means of physical connection between the East side lines whose rails terminated at East St. Louis, Illinois, and the west side lines whose rails terminated at St. Louis, Mo.

Neither the introduction of the Car Ferry nor the completion of the Eads Bridge made any change whatsoever in the method of making and dividing rates which had previously prevailed.

The only change that was brought about was the possible substitution of the railroad freight car for the wagon in the transportation of freight across the Mississippi River between East St. Louis, Illinois, and St. Louis, Missouri.

In 1877, the Chicago & Alton Railroad was completed from Kansas City, Missouri, on the Missouri River to East St. Louis, Illinois, by the construction of a bridge connecting its tracks on the east side of the Mississippi River at East Louisiana, Illinois, with its tracks on the west side of the river at Louisiana, Mo. Thus for the first time East St. Louis, Illinois, was reached by a railroad having a substantial proportion of its total mileage west of the Mississippi River. The Chicago & Alton railroad did not then and does not now, reach St. Louis, Missouri, from the west. Its line extends east and west across the State of Missouri from Kansas City to Louisiana, Missouri, where it crosses the Mississippi River to East Louisiana, Illinois, thence southwardly on the east side of such river to East St. Louis, Illinois. The Chicago & Alton Railroad did then, and does now reach, and serve St. Louis, Missouri, with respect to traffic moving between St. Louis, Missouri, and points on its line and on the lines of its connections west of the Mississippi River via East St. Louis, Illinois, and the rails of the Terminal Railroad Association of St. Louis and its predecessors.

The Chicago & Alton Railroad, desiring to compete for traffic moving between St. Louis, Missouri, and points west thereof with the roads whose rails extended westwardly from St. Louis, Missouri, naturally had to and did publish the same rates as were then in effect from and to St. Louis, Missouri, via such other roads. Traffic between St. Louis, Missouri, and points west of the Mississippi River, when handled by the Chicago & Alton, had to be moved through East St. Louis, Illinois. Therefore, the Chicago & Al-

ton could not charge rates from or to East St. Louis, Illinois, higher than the rates from or to St. Louis, Missouri. This had the effect of establishing between East St. Louis, Illinois, and substantially all points in the west and southwest, the same rates that were in effect between such points and St. Louis, Missouri, except that between a limited number of points short distances west from St. Louis, Missouri, on the lines radiating westwardly therefrom and which could not be reached by the Chicago & Alton, and East St. Louis, Illinois, the rates continued to remain higher than the rates between such limited number of points and St. Louis, Missouri.

As the rates between points east of the Mississippi River and St. Louis, Missouri, were higher than the rates between the same points and East St. Louis, Illinois, and as the rates between East St. Louis, Illinois, and points west of the Mississippi River via the Chicago & Alton had become the same as the rates between St. Louis, Missouri, and such points, it is obvious that the sum of the rates to and from East St. Louis, Illinois, produced a less total charge than the sum of the rates to and from St. Louis, Missouri, with respect to traffic moving between points east of the Mississippi River and points west of the Mississippi River. Therefore, for the first time, namely, in 1877, East St. Louis, Illinois, became the point on which the through rates between points east of the Mississippi River and points west of the Mississippi River made and divided. In other words, East St. Louis, Illinois, an east bank Mississippi River point, became the primary basing point for the establishment of through rates.

It is patent that if western lines other than the Chicago & Alton Railroad were to compete with the latter road for East St. Louis, Illinois, local traffic and traffic originating at or destined to points east of the Mississippi River, they had to

meet the rates between East St. Louis, Illinois, and points west of the Mississippi River established by the Chicago & Alton railroad, and in the year 1877 the west side lines voluntarily made and published rates to and from East St. Louis, Illinois, the same as their rates to and from St. Louis, Missouri.

This new route between St. Louis, Missouri, and East St. Louis Illinois, on the one hand and points west of the Mississippi River on the other hand, created by the completion of the Chicago & Alton Railroad through from Kansas City, Missouri, on the Missouri River to East St. Louis, Illinois, by way of the Chicago & Alton's bridge across the Mississippi River between Louisiana, Missouri, and East Louisiana, Illinois, followed by the voluntary action of the west side lines in publishing from and to East St. Louis, Illinois, the same rates then published by them from and to St. Louis, Missouri, firmly fixed East St. Louis, Illinois, as the rate basing point for the establishment of through rates between points east of the Mississippi River and also as the point on which such through rates were divided between the eastern and western lines. This practice thus established of using East St. Louis, Illinois, as the basing point for making such through rates, and as the point on which such through rates were and are divided, has continued up to the present time, except as to rates from and to certain territories east of the Mississippi River, which I will mention later.

No like change has ever occurred with respect to St. Louis, Missouri, that is, no eastern line has ever entered East St. Louis, Illinois, by way of St. Louis, Missouri, and no question was ever raised by the west side lines or any of them as to the propriety or impropriety of such lines assuming the cost of the Mississippi River transfer until certain changes were made in the rates between East St. Louis, Illinois, and St. Louis, Missouri,

on the one hand and certain points east of the Mississippi River on the other hand.

During 1906 and 1907, in compliance with a demand made by the business interests of St. Louis, Missouri, through what was then known as the 'Municipal Bridge & Terminals Commission,' joint through rates were published by the East Side Lines to and from St. Louis, Missouri, from and to certain points east of the Mississippi River which were slightly higher than the rates then in effect to and from East St. Louis, Illinois. This readjustment did not satisfy the St. Louis business interests, which strongly contended that the rates from and to St. Louis, Missouri, should be no higher than the rates from and to East St. Louis, Illinois, to and from said points east of the Mississippi River outside of a radius of 100 miles from and east of East St. Louis, Illinois.

The entire subject of joint through rates to and from St. Louis, Missouri, from and to certain points east of the Mississippi River, was reopened, and after a great deal of thought and study on the part of the railroads and numerous conferences with the Municipal Bridge & Terminals Commission, the railroads decided to comply with the insistent demands of such Commission and in 1908 the joint through rates from and to St. Louis, Missouri, and East St. Louis, Illinois, to and from certain points east of the Mississippi River outside of a radius of 100 miles from and east of East St. Louis, Illinois, were made the same. This was accomplished by reducing all of the rates from and to St. Louis, Missouri, and in some but not all cases advancing the rates from and to East St. Louis, Illinois. This reduction in the rates between St. Louis, Missouri, and said points east of the Mississippi River caused an appreciable loss in the revenues of the East Side Lines; and whilst the slight advances in the rates to and from East St. Louis

slightly offset the loss in revenue, such advances did not afford the East Side Lines anything like adequate compensation on account of such loss.

All of the negotiations between the railroads and the Municipal Bridge & Termnials Commission concerned solely the question of rates between St. Louis, Missouri, and certain points east of the Mississippi River. It was never understood that the reduction in said rates to and from St. Louis, Missouri, would affect in any manner whatsoever the basis for making and dividing rates applicable to traffic moving between points east of the Mississippi River and points west of the Mississippi River.

After the completion of the line of the Chicago & Alton Railroad by the construction of that Company's bridge across the Mississippi River between Louisiana, Missouri, and East Louisiana, Illinois, and the voluntary action of the West Side Lines in extending their St. Louis, Missouri, rates to and from East St. Louis, Illinois, as heretofore described, and which as before stated first fixed East St. Louis, Illinois, as the basing point for making and dividing through rates between points east and west of the Mississippi River, the West Side Lines further recognized the fact that the east bank of the Mississippi River had naturally and inevitably become such basing point for making and dividing such through rates by publishing the same rates to the east bank of the Mississippi River at crossings north of East St. Louis, Illinois; namely, East Hannibal, Illinois; Quincy, Illinois; East Burlington, Illinois; East Keokuk, Illinois; Rock Island, Illinois; East Louisiana, Illinois, and East Dubuque, Illinois. This fact, namely, that the east bank of the Mississippi River had naturally and inevitably become such basing point, was further recognized and accepted by both the West Side Lines and the East Side Lines during the years subsequent to 1877 in and by the various arrangements and understandings which they had

from time to time for the establishment and changing of through rates between points east and west of the Mississippi River and for dividing such through rates, whereby all such rates from time to time so established and changed were based on East St. Louis, Illinois, and the aforesaid other east bank Mississippi River crossings north of East St. Louis, Illinois, and the divisions of such rates were likewise based on such east bank Mississippi River crossings." (Rec. 423-427.)

This witness testified that any change in the practice which has heretofore prevailed and now prevails for the payment of the Mississippi River transfer charges would affect other railroad companies who are not parties to this proceeding, and who are not parties to the Anti-Trust suit brought by the United States of America against all the defendants, and he submitted a chart which explained how such other companies would be affected. (Rec. 429-430.)

The witness then explained in detail and filed many tariffs and exhibits demonstrating that any change made at this time in the present practice of the payment of river transfer charges at the St. Louis and East St. Louis Mississippi River crossing would have to be followed by similar changes at all the Mississippi River crossings north of East St. Louis to and including East Dubuque, and would have the effect of reducing the revenues of the eastern connections of the East Side Lines serving those north-river crossings proper. (Rec. 431.)

The witness then explained the efforts of the Missouri, Kansas & Texas Railway Company, Missouri Pacific Railroad Company, and the St. Louis-San Francisco Railway to obtain the approval of the Interstate Commerce Commission of tariffs showing the elimina-

tion of these Terminal Companies as carriers participating in through rates. (Rec. 431-437.)

This witness then explained the efforts the East Side Lines and the West Side Lines had made in 1917, through a joint Committee consisting of two representatives of the East Side Lines and two representatives of the West Side Lines, for the purpose of settling how the through rates should be divided and how payments of the transfer charges of these Terminal Companies should be paid; that all the members of this Committee representing the West Side Lines and the East Side Lines agreed that the controversy should be submitted to the Interstate Commerce Commission, and the following recommendation was unanimously made by this Committee:

> "In view of the fact that it was impossible to arrive at a conclusion different than heretofore, i. e., declination of the Eastern Roads to change the present methods, the representatives of the two Western Roads suggested that the question be referred to an Interstate Commerce Commissioner for arbitration, the two members of the Eastern Roads assenting thereto." (Rec. 438-439.)

The report of this Joint Committee representing the East Side Lines and the West Side Lines is set out on pages 440-441 of the Record.

The witness testified that the suggestion of the Committee that this whole matter be referred to the Interstate Commerce Commission was not agreeable to the West Side Lines, although it was acceptable to the East Side Lines, but that no action was ever taken upon the report. (Rec. 441.)

This witness then testified that he was familiar with the methods employed by Terminal Companies, other than these Terminal Companies, in fixing their rates as did these Terminal Companies on the basis of cents

per hundredweight, as well as cents per ton, and that "the fact that compensation received by the carriers may be based on cents per hundredweight or cents per ton, or dollars and cents per car, has nothing whatever to do with determining the character of the service rendered, whether terminal services or road-haul service." (Rec. 442.)

The West Side Lines then offered in

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copies of bills of lading, covering shipments made by the Graham Paper Company, dated September 11, 1916, of the American Car & Foundry Company, dated October 20, 1920, of the Walsh Fire Clay Products Company, dated December 22, 1920, of the Griesedieck Beverage Company, dated July 20, 1920, and of the Traffic Motor Truck Corporation, dated July 19, 1920, wherein the names of the Terminal Companies had been inserted as carriers, and also offered in evidence switching tariffs showing the Terminal Companies as participating carriers during Federal Control, the tariffs being dated September 20, 1919, and effective November 11, 1919. (Rec. 450-451.)

A statement was offered in evidence showing the charges paid the Terminal Railroad Association by the St. Louis-San Francisco Railway Company during the months of January, February and March, 1917, as its proportion of through rates on basis of tariffs and division sheets on through traffic as follows:

	"Tonnage	Amount
C. Amount paid on through east-bound traffic delivered to East Side Lines for transportation beyond	275,801	$ 80,864.24

D. Amount paid on through west-bound traffic from East Side Lines for transportation beyond St. Louis	138,727	42,310.25
Total	414,528	$123,174.49"

(Rec. 451.)

A copy of the Amended Petition, of the Answer thereto of the Terminal Railroad Association, and of the Reply thereto in the case of Wittig v. Terminal Railroad Association filed in the Circuit Court of the City of St. Louis, December Term, 1919, were introduced in evidence. (Rec. 453-486.)

A letter from J. L. Minnis, addressed to James Hagerman, General Counsel, Missouri, Kansas & Texas Railroad, dated December 24, 1910, was introduced in evidence. (Rec. 486-490.)

A letter, dated November 18, 1920, to Chairman Clark of the Interstate Commerce Commission, signed by C. S. Burg, an attorney for the Missouri, Kansas & Texas Railroad Company, wherein he undertook to set forth the status of this controversy and transmitted a copy of the motion of the West Side Lines, together with the order to show cause which had been entered by the District Court, was introduced in evidence. (Rec. 490-492.)

The reply of Chairman Clark to Mr. Burg, dated November 26, 1920, was then offered in evidence, and, after acknowledging the receipt of the letter with transmitted copies, Chairman Clark wrote as follows:

> "These are questions of tariff construction and application which under ordinary circumstances we would feel obliged to raise in connection with the attempt made by the M. K. & T., the Frisco,

the Missouri Pacific and the Rock Island, to conform their participation in tariffs to what they believe to be the decree of the Court, but inasmuch as this matter is before the Court and as possibly a rather general or complete reformation of tariffs applying to and from St. Louis and East St. Louis may be required or necessitated in the immediate future, we shall, for the present at least, withhold challenge to your tariffs." (Rec. 492.)

This concluded all the testimony and evidence offered by the parties before the Examiner.

The case was then submitted to Circuit Judges Sanborn, Hook and Stone, but before a decision was rendered, Judge Hook died and Judge Carland was called in to act in place of Judge Hook, and Judge Carland on August 21, 1922, handed down the following majority opinion, representing his views and those of Judge Stone:

"The above-entitled action was brought by the United States against the above-named defendant and certain other associated companies, including railroads owning stock of said defendant and associated companies, and certain individuals who were directors of the Terminal Association. The purpose of the action was to have it adjudged that the Terminal Association and its allied companies, hereafter called 'Terminal,' constituted a combination in violation of the Anti-Trust Act of July 2, 1890 (26 Stat. 209). On March 2, 1914, this Court entered its final decree in the action, wherein it was ordered and adjudged among other things as follows:

1. 'The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various Bridge and Terminal Companies composing it are operated as railroad transportation companies. The combination may,

however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified.

'An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered.'

6. 'Nothing in this decree shall be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.'

The decree contained the usual reservations for such further orders and decrees as might be deemed necessary.

On or about November 12, 1920, the M. K. & T. Ry. Co., the St. L. & S. F. Ry. Co., M. P. R. Co. and C. R. I. & P. Ry. Co., who were defendants in the above-entitled action, filed in this Court a petition wherein prayed that the present Proprietary Companies, and their nominees and representatives upon the board of directors of the Terminal, be made parties defendant, and that certain

railroad companies and their representatives on said Board of Directors, and the Terminal, together with its associates, be cited to show cause why they should not be punished for contempt of the injunctive order and decree of this Court above mentioned, and for general relief.

An order to show cause was issued, and on the return day the respondents appeared and filed a return. The corporations and individuals whom it was prayed should be made parties to the original action also appeared in the contempt proceedings, and there being no objection, so far as the record shows, to their being made parties to the original action for the purpose of the present proceedings, they are made parties accordingly.

On the filing of the return of respondents to the order to show cause, a Master was appointed to take testimony on the issues of fact made by the petition and return of the respective parties. The testimony has been taken and reported to the Court, and the case is now submitted upon the evidence taken and the oral arguments and briefs of counsel.

On the filing of the return to the order to show cause, counsel for respondents filed a motion to dismiss the petition and to quash said order to show cause, upon the ground that the issues in the original proceeding were only between the United States and the defendants therein, among which were the petitioners; that no cross-bill was filed and no relief prayed for by anyone except the United States; that the original action could not have been prosecuted except by the United States on the relation of the Attorney-General, and the United States has made no complaint that the defendants in the original action or the respondents in the present proceedings had not obeyed the decree of this Court, and therefore it was not competent for petitioners to endeavor to prosecute the suit by way of proceedings for contempt.

Another ground of the motion to dismiss was

that the grievances complained of by petitioners were wholly within the power and jurisdiction of the Interstate Commerce Commission. We are of the opinion that the evidence taken in the contempt proceedings shows that the petitioners have a sufficient interest to present the alleged violation of the injunction on the part of respondents to this Court. In so deciding we put to one side the question as to what this Court might do on its own motion in regard to the matter in controversy. The petitioners are Proprietary Companies with reference to the Terminal; that is, they own an interest in the same represented by shares of stock. They claim the Terminal, and the services performed by it, are very valuable and indispensable to their lines of railway; that under the terms of the decree of this Court it will be dissolved if it does not conduct its business simply as a terminal; and therefore that petitioners have an interest in having it restricted as provided by the decree.

It is also claimed by the petitioners—and this is the real cause of the present controversy—that if the Terminal is allowed, in violation of the decree, to operate as a railroad transportation company and not as a terminal, it will be possible for it, by reason of what are called the east side lines of railroad, being those having their termini at East St. Louis on the east side of the Mississippi River, having control of the Terminal through stock ownership, to compel the West Side Lines, being those railroads which have their termini at St. Louis on the west side of the Mississippi River, to pay the transfer charges of the Terminal both ways across the Mississippi River, amounting in the case of one of the petitioners to five hundred thousand dollars per annum.

Section 6 of the decree above quoted cannot be used to destroy section 1. The decree declares that, as to matters within the control of the Commission, this Court did not intend to interfere, nor

is it asked to do so, in this proceeding. This Court, however, has the power, notwithstanding the laws to regulate commerce, to declare a combination to be in violation of the Act of July 2, 1890, and to dissolve the same, and for that purpose to exercise all necessary powers to accomplish the purpose sought. The proceeding which resulted in the decree rendered was one to remove a restraint upon trade and commerce. The second clause of section 6 refers to the 'mode of billing traffic over its lines, or the establishment of joint through rates or routes over its lines.' This language must be construed with reference to the object and purpose of the decree. A decree which was the result of three appeals to the Supreme Court was not intended to be nullified by section 6. The whole object of section 6, when construed with reference to the whole decree, was to make it clear that this Court did not intend to interfere with the exercise of any power by the Interstate Commerce Commission, if not inconsistent with the decree. This Court has the same jurisdiction now to make its decree effective as it did to decide the matters contained in section 1 thereof. The motion to dismiss is therefore denied.

The petitioners charge that the Terminal, prior to the institution of the original action, prior to the decree, and now, is operated as an independent carrier between the East and West Side Lines, that they were so operated prior to the decree, the decree itself is conclusive. That they have been so operated at all times since is either admitted or shown by the evidence. Acting as a railroad company, and not as a terminal company. was the only ground on which the Terminal was declared an unlawful combination, and still it is contended that such decree did not require any change in the manner and methods of doing the business of such Terminal. The evidence and admissions of counsel show that the Terminal, in addition to doing a terminal business proper,

and in addition to transporting as an accessory to their strictly terminal business traffic exclusively originating, moving and having its destination upon the lines of the same, has at all times continued as before the entering of the final decree, and still continues to engage in the general railroad transportation business as an intermediate common carrier, as an initial common carrier, and as a delivering common carrier, and has made no changes whatever in its previous custom in that respect; that said Terminal is now, and ever since the entering of said final decree has been, engaged in the transportation, as a railroad common carrier and as a railroad transportation company, of every class of traffic, whether east or westbound, and whether coming to them from points beyond their terminals and delivered to them by Proprietary as well as by other railway companies, as well as all classes of traffic having origin in East St. Louis, and whether upon its terminals or upon the terminals and rails of the same, of the Proprietary and other railroad companies when destined to St. Louis, Missouri, or points beyond St. Louis, as well as traffic of every character originating in St. Louis, Missouri, and whether upon its own terminals or the terminals and rails of the Proprietary Companies or some other railway company in St. Louis, Missouri, for shipment to East St. Louis, as well as all such traffic destined to points beyond East St. Louis; that the Terminal continues to interpose itself as a transportation company between the railroads whose own rails terminate on opposite sides of the Mississippi River and between the city itself and the roads terminating on the east side of the river; that the Terminal is not acting in good faith as the impartial agent of the various Proprietary Lines; that the tracks, bridges and other terminal facilities of the Terminal have not at any time been, and are not now being, used by the Proprietary Companies other than the petitioners, as ex-

tensions of their railroads; that the Terminal has not abandoned all or any operating methods and charges as and for railroad transportation, and has not at any time, and is not now, confining itself to the transportation of terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and assisting in the collection and distribution of traffic for the carrier companies, switching, storing and the like; that the Terminal is now, and it has been at all times in the past, a party to innumerable tariffs, through concurrence therein and the filing of division sheets, whereby it participates as a common carrier and as a general railroad transportation company in the rates on all business so received and handled; that the East Side Lines, having control of the Terminal, compel the West Side Lines to pay the Terminal its transfer charges for supplying and operating facilities for the interchange of both through eastbound and through westbound freight traffic between the East Side Lines and the West Side Lines.

What the United States did in the operation of the Terminal during the period of their control does not affect the question before the Court in any way, first, because the United States was at war, and the decree of this Court was silent; second, the Terminal, having assumed again the operation of its property, is subject to the decree of this Court, the same being in full force and effect. As a conclusion of law from the above facts, we find that the Terminal has acted in the premises in violation of the order and decree of this Court. Notwithstanding the foregoing, we are of the opinion that the decree entered ought to have been more specific in stating what the Terminal was enjoined from doing. In view of this, we are further of the opinion that an order supplemental to the decree should be entered:

1. Requiring the East Side Lines to pay the reasonable transfer charges of the Terminal on

westbound through freight, to the rails of the West Side Lines.

2. Requiring the Terminal to cease and desist from issuing bills of lading or receipts taking the place of bills of lading, or issuing passes usable by passengers riding on through tickets from points on its lines to distant points beyond its lines;

3. Requiring the Terminal to cease and desist from becoming a party to tariffs through concurrences therein and the filing of division sheets;

4. These things to be done within sixty days from the date of the order;

5. Upon proof of non-compliance with the order, the appointment of a receiver and dissolution of the Terminal to be considered.

And it is so ordered." (Rec. 494-499.)

Judge Sanborn filed the following dissenting opinion:

"I concur in the view that a supplemental order should be entered making the first, second, fourth and fifth requirements set forth in the foregoing opinion.

But in my opinion it is not a violation of the final decree for the Terminal Company to become a party to through tariffs and division sheets upon which its charges are specified made by the line hauling roads and concurred in by it. United States v. Union Stock Yards Company, et al., 226 U. S. 286, 303, 304, 305, 306; St. Louis Chamber of Commerce v. B. & O. R. R. Co., 57 I. C. C. 639, 640, 641, 644, 645, 646, 653, 654.

Nor am I persuaded that the transportation of passengers and freight and of the cars carrying them across or over the property and rails of the Terminal Company from the ends of the rails of the West Side Lines to the ends of the rails of the East Side Lines, and from the ends of the rails of the East Side Lines to the ends of the rails of the West Side Lines, or in other directions over its property and rails constitutes any violation of

the final decree. The Terminal undoubtedly has the right under that decree to carry on 'the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between roads and the distributing of traffic for the carrying companies, switching, storing and the like.' The second paragraph of the contract as it now stands after its modification by direction of the Court still requires the Terminal to maintain 'a freight station or stations, additional main and sidetracks, switches and turnouts whenever the same may be necessary, suitable in size and location and manner of construction; also to perform promptly and efficiently the work of receiving, handling and transporting all passenger and freight traffic of the several Proprietary Companies of St. Louis and East St. Louis, and of other railroad companies which may be hereafter, under the terms of this agreement, admitted to a joint use of said Terminal property.' The property of the Terminal lies between the east and west line hauling railroads. The receipt from the line hauling railroads of passengers and freight destined to points on its rails, the delivery of them to such points, the receipt of passengers and freight originating on its rails destined to points on or beyond the rails of the line hauling roads is also a part of its legitimate business as a terminal company. In the conduct of this business as a terminal company it necessarily engages in the transportation of passengers and property and is also a transportation company and a common carrier. Section 1 of the Act to Regulate Commerce, Section 8563, U. S. Comp. Stat. 1918. Transportation over its property on its rails of the freight and passengers delivered to it from the line hauling roads on one side of its property destined to or beyond the rails of the line hauling roads on another side of its property is a substantial, perhaps the chief, part of its legitimate business as a terminal company. The receipt and delivery of

those passengers and that freight from and to the line hauling roads is indispensable to the conduct of its legitimate business as a terminal company.

In view of these facts and of the final decree I am unable to assent to the view that the Terminal is now, or ever since the entry of the final decree, has been substantially violating that decree by engaging, otherwise than within the scope and limits of its legitimate business as a terminal company, in the transportation, receipt or delivery of any of the classes of traffic described in the preceding opinion, nor am I persuaded that in violation of that decree it has interposed itself as a transportation company, otherwise than as it lawfully might do within the limits of the scope of its duties as a terminal company between the line hauling railroads whose rails terminate on opposite sides of the Mississippi River. On the other hand, it seems to me that the Terminal is between the rails of these line hauling companies by lawful authority under its contract with the Proprietary Companies and the final decree as a terminal company for their convenience, pursuant to the contract to which reference has been made, and that it has conducted its transactions, its transportation, its receiving and delivery of passengers and freight in the discharge of its duties as a terminal and switching company within the lawful limits of its authority so to do prescribed by the final decree and its contract." (Rec. 499-500.)

Before a final decree could be entered, pursuant to Judge Carland's opinion, he died and thereupon Judge Lewis was called on to act in place of Judge Carland.

The East Side Lines and the Terminal Companies made an ineffectual effort for a re-submission of the case and re-argument before Circuit Judges Sanborn, Stone and Lewis, but their motion was overruled, and they saved exceptions. (Rec. 501.)

On February 8, 1923, Judge Lewis filed a majority opinion, concurred in by Judge Sanborn, as follows:

"On March 2, 1914, decree on the merits was entered in this cause. The present proceeding is one in contempt for violation of that decree. On the facts adduced after the respondents had made their return to the citation it was the unanimous conclusion of the three Judges then sitting that respondents should be held as in civil contempt, but there was a difference between them as to the extent of the violations. That difference, as I understand it, arose primarily out of the terms of the sixth paragraph of the decree, reading thus: 'Nothing in this decree shall be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission,' Judges Carland and Stone holding that that paragraph ought not to be so construed as to permit respondent Terminal Association to become, in association with other respondents, a party 'to tariffs through concurrences therein and the filing of division sheets,' though they conceded that the decree needed clarification in that respect and recommended that the decree be amended in specific suggested terms so as to remove the doubt. Judge Sanborn dissented, and owing to the death of Judge Carland nothing further was done by the Court as then constituted. The amendment of the decree was not made. The opinions expressing the respective views were filed August 21, 1922, and the cause did not come on again until the December, 1922, Term.

I am unwilling to give to the sixth paragraph of the decree the construction and meaning attributed to it by Judges Carland and Stone, and thus hold respondents in contempt on account of their past

co-operation with the Terminal Association in filing division sheets and thus sharing with it the tariffs on through shipments. That, it seems to me, is just what the sixth paragraph expressly permitted. Neither do I think the sixth paragraph can be held to be in conflict with and destructive of other parts of the decree. I raise no question as to the facts found in the majority opinion, but accept as true the statement, 'The evidence and admissions of counsel show that the Terminal, in addition to doing a terminal business proper and in addition to transporting as an accessory to their strictly terminal business traffic exclusively originating, moving and having destination upon the lines of the same, has at all times continued as before the entering of the final decree, and still continues, to engage in the general railroad transportation business as an intermediate common carrier, as an initial common carrier, and as a delivering common carrier, and has made no changes whatever in its previous custom in that respect.' Notwithstanding this I do not think it follows as a conclusion of law, as stated by the majority, 'that the Terminal has acted in the premises in violation of the order and decree of this Court.' The point of divergence over the meaning of the sixth paragraph seems to me to be this, whether 'the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines,' was prohibited by the decree, or whether the decree simply left that subject to the control of the Interstate Commerce Commission. I think the latter meaning should be given to it.

Furthermore, I cannot see the necessity of amending the sixth paragraph as proposed. The practice of through billing on a joint rate is open to both East Side and West Side Lines, as I understand it. Such arrangements are at all times within the exclusive control and regulation of the Interstate Commerce Commission, with power to determine in the first instance whether they are

just, equitable and fair to the participating carriers, to the shippers and to the public, and it is not shown that the exercise of that power granted to the Commission by Congress will lessen or interfere with terminal services and facilities to be extended alike to all and every East Side and West Side Line. Hence there is no reason, in my judgment, for holding the respondents in contempt in that respect, or amending the decree so as to expressly prohibit that practice. It follows that the respondents are not in contempt in those respects." (Rec. 501-503.)

Judge Stone filed a dissenting opinion as follows:

"We are here to protect and uphold a decree affirmed, in form and substance, by the Supreme Court. I fear that the action of the majority effects a modification of that decree and not a mere construction and application thereof.

The matter immediately before this court is the entry of a decree in conformity with an opinion written by Judge Carland (in which I concurred) adjudging and defining this contempt. In that opinion, the effect of Section 6 of the decree and the contempt of the Terminal by its practices of being a party to tariffs and division sheets were clearly set forth. As to paragraph 6, Judge Carland said:

'A decree which was the result of three appeals to the Supreme Court was not intended to be nullified by Section 6. The whole object of Section 6, when construed with reference to the whole decree, was to make it clear that this Court did not intend to interfere with the exercise of any power by the Interstate Commerce Commission, if not inconsistent with the decree.' As to the practices of joining in tariffs and division sheets, he said:

'The petitioners charge that the Terminal prior to the institution of the original action, prior to the decree, and now, is operated as an indepen-

dent carrier between the east and west side lines, that they were so operated prior to the decree, the decree itself is conclusive. That they have been so operated at all times since, is either admitted or shown by the evidence. Acting as a railroad company, and not as a terminal company, was the only ground on which the Terminal was declared an unlawful combination; and still it is contended that such decree did not require any change in the manner and methods of doing the business of such Terminal. The evidence and admissions of counsel show that the Terminal, in addition to doing a terminal business proper, and in addition to transporting as an accessory to their strictly terminal business traffic exclusively originating, moving and having destination upon the lines of the same, has at all times continued as before the entering of the final decree, and still continues to engage in the general railroad transportation business as an intermediate common carrier, as an initial common carrier, and as a delivering common carrier, and has made no changes whatever in its previous custom in that respect; that said Terminal is now, and ever since the entering of said final decree has been, engaged in the transportation, as a railroad common carrier and as a railroad transportation company, of every class of traffic whether east or westbound and whether coming to them from points beyond their terminals and delivered to them by proprietary as well as by other railway companies, as well as all classes of traffic having origin in East St. Louis, and whether upon its terminals or upon the terminals and rails of the same, of the proprietary and other railroad companies when destined to St. Louis, Missouri, or points beyond St. Louis, as well as traffic of every character originating in St. Louis, Missouri, and whether upon its own terminals or the terminals and rails of the proprietary companies or some other

railway company in St. Louis, Missouri, for shipment to East St. Louis, as well as all such traffic destined to points beyond East St. Louis; that the Terminal continues to interpose itself as a transportation company between the railroads whose own rails terminate on opposite sides of the Mississippi River and between the city itself and the roads terminating on the east side of the river; that the Terminal is not acting in good faith as the impartial agent of the various proprietary lines; that the tracks, bridges and other terminal facilities of the Terminal have not at any time been, and are not now being, used by the proprietary companies other than the petitioners, as extensions of their railroads; that the Terminal has not abandoned all or any operating methods and charges as and for railroad transportation, and has not at any time, and is not now confining itself to the transportation of terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and assisting in the collection and distribution of traffic for the carrier companies, switching, storing and the like; that the Terminal is now, and it has been at all times in the past, a party to innumerable tariffs, through concurrence therein and the filing of division sheets, whereby it participates as a common carrier and as a general railroad transportation company in the rates on all business so received and handled.'

"Yet the present order, in effect, follows the minority opinion in the respects above discussed. However, I do not question the right of a majority of the court to change, before entry of the order, the controlling view of the court as formerly expressed by Judge Carland. Whether it should be done after hearing on that proposition is another matter respecting which I am not concerned. The matter in which I am concerned is whether this order properly construes the final decree it is intended to protect and enforce. If

the matter of participation in tariffs were included in the order now entered, I should agree to the order. However, this matter seems to me to be one of such importance in the decree, that I cannot join in an order which, by excluding it, denies its existence.

The Terminal suit was for violation of the Anti-Trust Act. The violation charged and found proven was a combination of fourteen railroads, which combination unlawfully restrained competition in interstate commerce. The combination consisted of a Terminal Association which completely controlled railway entrance into the St. Louis-East St. Louis Territory. The unlawful restraints of competition in interstate commerce exercised by this combination were two: First, exclusion of other transportation lines from this valuable territory; second, elimination of competition in charges of service between the members thereof, resulting in monopolization of and therefore injury to the public interested in transportation across, to or from this important trade territory.

There was no dispute that the combination, in the form of a (so-called) Terminal Association existed. The only question was whether it was, in effect and intent, an unlawful restraint upon competition in interstate commerce affecting the above territory. The contention of the defendants was that the combination was not only innocent in effect and intent but was a necessity to obtain proper and economical service for the public within this territory.

The Supreme Court found the combination was unlawful because restricting competition in interstate commerce. While the restrictions so found all affected the public, yet as to direct effect the court divided them into two classes, first, affecting other carriers; second, methods of business affecting the public. Such restrictions affecting other carriers arose from a power of denial to

them of equal use, control and management of the facilities of the Terminal Association. Such restrictions affecting the public arose from preventing the natural competition which would have existed between carriers coming to or into this territory as to charges and service for carriage within this territory. Such harmful restrictions affecting the public took form through and arose out of the Terminal Association acting as a regular transportation company (as distinguished from a purely Terminal Company). The concrete definite ways in which this action as a transportation company was harmfully manifest were (a) through the imposition of a so-called 'arbitrary charge'; and (b) through methods of billing freight only to East St. Louis, and (c) making a distinct line hauling charge to St. Louis.

It was because of the finding of all of the above restrictions that the court declared the Terminal Association an unlawful combination violating the Anti-Trust Act.

But the court recognized the utility, to the carriers and the public, of a common terminal agency in this territory. Therefore, it sought to serve the public by decreeing that if the Terminal Association should eliminate the above found objections and operate as a purely terminal company with its facilities and services open to all carriers, it might escape dissolution. As thus reformed, in constitution and practices, that company would then be enabled to perform useful services to the public and, at the same time be free of the features objectionable to the statute. It is repeatedly emphasized that such continued existence rests upon two conditions, viz., admission of all carriers on equal terms and transaction of a purely terminal business as the agent of the carriers using its facilities.

To make this plan effective required two things to be done, first, to so reform the existing contracts affecting the Terminal Association so as

to admit outside companies to the use of its facilities; second, to abandon the objectionable practices. The first step must be through voluntary changes, in those existing contracts, by the parties thereto. The second step was the condition to the continued existence and operation of the Terminal Association.

The Supreme Court, in its opinion on the first appeal, 224 U. S. 383, 411, carefully outlined the scope of this reorganization plan and of the definition in the proposed decree of conditions upon which the Terminal might continue. In the opinions, on the second 226 U. S. 420, 425, and last 236 U. S. 194, 203, appeals, it was pointed out that an important duty rested upon the trial court in determining the sufficiency of this reorganization plan (changes in existing contracts) to meet the terms of the mandate from the first appeal. Such plan was submitted to the trial court and adopted by it in a final decree. The sufficiency of this plan has not been attacked. The other branch of the decree, defining the conditions under which the Terminal (when reorganized) might continue in business, followed, as near as possible, the wording of the mandate. It required that the Terminal cease certain business methods or practices which it had employed. These objectionables were specifically defined and designated. They were three, as follows:

(1) conducting its constituent companies as 'railroad transportation companies' (defining 'terminal Business' as distinguished from 'railroad transportation,' to be 'such as supplying and operating facilities for the interchange of traffic between railroads and to assist in collecting and distributing of traffic for the carrier companies, switching, storage and the like');

(2) rebilling, at East St. Louis Termini, westbound freight destined to St. Louis or beyond and (3) imposing an arbitrary charge on traffic originating within an one hundred mile zone. The

decree sought to secure and enforce cessation of such methods and practices by injunction orders as to each of these three.

As to 'transportation business,' the order was 'from in any wise managing or conducting * * * and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making any charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered.' As to rebilling the order was that westbound traffic on railroads East of the Mississippi River destined to St. Louis or beyond or eastbound traffic from St. Louis destined to points east of the River should no longer be billed to East St. Louis termini and there rebilled 'but for all such traffic each railroad company shall issue through bills of lading unless otherwise directed by the person controlling the same.' As to the arbitrary charge, the order was 'from making any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one-hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.'

That final decree was carried to the Supreme Court by both parties objecting that it failed to comply with the earlier mandate of the Supreme Court. The Supreme Court ruled that the decree below giving effect to the mandate of this court will be modified so as to recognize the right of the Terminal (Association) Company as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon and exclusively intended for delivery on the same and in other respects the decree will be affirmed.' (236 U. S. 194, 210.)

This final decree of the trial court contained

two other provisions of particular importance to this contempt proceeding. The first relates to the scope of jurisdiction in this proceeding. It was that 'This cause is reserved for such further orders and decrees as may be deemed necessary.' This reservation obviously retained jurisdiction of the cause beyond the mere power, always inherent in courts, to punish, by fine or imprisonment, a contempt of a decree. Within this general retention of jurisdiction would lie all power necessary to effectuate the object and purpose of the decree—even to dissolution of the Terminal Association. The Association having elected to escape dissolution by complying with certain conditions, it can, under this retained jurisdiction, be dissolved in this cause if it fail or refuse such compliance.

The other provision of the final decree, above referred to is the legal crux of this contempt proceeding in so far as the meaning and effect of that decree are concerned. It is:

'6. Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, **or the establishing of joint through rates or routes over its lines**, or any other power conferred by law upon such commission.'

It is contended that this paragraph of the decree had the result of reserving from the influence of the decree all matters concerning the method of doing business and making charges therefor by the Terminal Association. This conclusion is based upon the argument that jurisdiction over all such methods and charges of the Terminal Association are given to the Interstate Commerce Commission under the Interstate Commerce Acts. Such a conclusion leaves the decree effective only as to those portions requiring changes in

the existing contracts so that any carrier connecting with the terminal trackage might use its facilities upon equal terms with the proprietary lines (Oral Arg. 32, 51-2, 57; Brief of Respondent 51).

If that contention is true then the court entered a lengthy decree covering five specific matters, set forth carefully in as many numbered subdivisions, and then, by the above reservation, nullified all of the effect thereof except as to the second subdivision, which set forth the changes required in existing contract. I cannot accept such a conclusion.

The decree approved by the Supreme Court was intended to be effective in every respect, with the possible exception of the portion referring to the 'Arbitrary' which was explained in the opinion on the last appeal.

No fact stands out clearer or was more emphasized in the decree and in the opinions of the Supreme Court, than that something more was required than the alteration of the existing contract. That 'something' was that the Terminal should be operated as such and not as a regular transportation line, except as to exclusively terminal trackage traffic. It was because it was not so operated that the Anti-Trust action was brought. That the suit did not originate on account of some carrier being denied use of the terminal facilities for equal charges with the proprietary companies is certain because all carriers were then accorded such use (224 U. S. 382, 400). But the court held that:

'Aside from their power under all the conditions to exclude independent entrance to the city by any outside company, their control has resulted in certain methods which are not consistent with freedom of competition.'

Every reference in the decree and opinions to the methods, past and future, of operation (with the exception of the 'arbitrary') were intended

to effectuate and secure this definitely stated limitation in the character of future operation. The terminal was declared to be unlawful if operated as a transportation line and to be lawful if operated purely and solely as terminal property. In the decree itself is the definition intended by the court of terminal operation. That definition is amplified in the opinions. The decree definition is 'such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing and the like.' This definition relates not merely, nor in fact at all, to the physical acts of terminal service, since those must necessarily remain the same as before, but it referred to methods of charging, billing and the like. This is proven by the requirements that it should abandon 'all operating methods and charges as and for railroad transportation'; that the defendants were enjoined 'from in anywise managing or conducting * * * and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the companies using the same, and from making charges otherwise than for and according to the nature of the service so lawfully authorized to be rendered'; that rebilling at East St. Louis was enjoined; and that through billing was required. The intent, purpose and effect of the decree was to permit the combination to continue solely as the terminals of the carriers desiring to use the same. The decree covered all manner of operation, business or charges which were different in a terminal property of a carrier and in the outside of terminal haul, or transportation business of the carrier. Those differences exist, practically speaking, in participations in and division of charges and tariffs of the regular using carrier and in issuance, as a separate carrier, of bills of lading and billing of freight passing off or coming onto its tracks.

It is true that the Interstate Commerce Acts give the Commission jurisdiction over terminal as well as regular transportation in respect to charges and methods of billing, but the Anti-Trust Act is fully applicable to railroads. The courts have jurisdiction, under the Anti-Trust Act, to declare that a combination of carriers, as to certain facilities, cannot continue if they employ in connection therewith the methods of billing and manner of charging used by them in ordinary transportation. The Commission has nothing to do with that and certainly cannot nullify such action of the court. The court decrees that this shall be a purely terminal association in all respects, including tariffs, charges and methods of billing. The jurisdiction of the Commission attaches to determining the methods and charges within the scope or limits herein defined by the Supreme Court. That was the entire scope of the provision, in the decree, concerning the Commission. If the Association, any of its constituents or any of the carriers using its facilities step outside the limits of the decree, the sanction by the Commission of the forbidden acts affords no shield or excuse to enforcement of the decree.

The decree and the opinions are positive upon another point. That is, that the terminal shall be the agent of each of the using roads, impartially as to service and charges.

As to whether the facts justify a finding that the decree has been violated (if the above construction of the decree is correct) there is no dispute. The proof and the admissions at the hearing leave no doubt that the Association publishes or concurs and participates in regular transportation tariffs, division sheets and rates; issues passes; issues billing or bills of lading beyond its tracks and that the entire cost of terminal service for the through, or transfer, traffic (by far the major business of the Association) falls upon the West Side Lines.

The order as entered includes the issuance of passes, bills of lading and shipping receipts; and does away with the long existing practice of breaking the tariffs on the East side of the river. It excludes participation in tariffs of the carriers. I am unable to agree with the reasoning which declares the Terminal in contempt for issuing through bills of lading or receipts and passes as violative of the decree and permits continuance of joint tariff participation through concurrences and division sheets. The argument is that paragraph 6 of the decree (relating to the Commerce Commission) forbids interference with the joint tariffs because that was a subject matter within the power of the Commission. Is not equally so, the matter of bills of lading, receipts and passes?

Therefore, does not the exclusion from this order of the provision as to the tariffs result, as I fear, in a modification or departure from the decree?" (Rec. 503-509.)

On the same day, February 8, 1923, upon which the opinions of Judge Stone and Judge Carland had been filed, Circuit Judges Sanborn and Lewis caused to be entered the following

ORDER:

"The motion of Missouri, Kansas & Texas Railway Company, St. Louis-San Francisco Railway Company, Missouri Pacific Railroad Company and The Chicago, Rock Island and Pacific Railway Company praying that certain of the defendants herein, to-wit, the Baltimore & Ohio Southwestern Railway Company and R. N. Begien, its representative on the board of defendant Terminal Railroad Association of St. Louis; the Chicago & Alton Railroad Company and W. G. Bierd, its representative on said board; the Chicago, Burlington & Quincy Railroad Company and E. P. Bracken, its representative on said board; the Cleve-

land, Cincinnati, Chicago & St. Louis Railway Company and H. A. Worcester, its representative on said board; the Illinois Central Railroad Company and C. M. Kittle, its representative on said board; the Louisville & Nashville Railroad Company and John Fitzgerald, its representative on said board; the Southern Railway Company and John B. Munson, its representative on said board; the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company and Benjamin McKeen, its representative on said board; the St. Louis Southwestern Railway Company,the Wabash Railway Company and J. E. Taussig, its representative on said board, and Henry Miller, the representative at large upon said board, as well as president of said Terminal Railroad Association of St. Louis; the Terminal Railroad Association of St. Louis, the St. Louis Merchants Bridge Terminal Railway Company and the Wiggins Ferry Company, be cited to show cause, if any, why they, and each of them, should not be punished for contempt of the injunctive order and decree of this court in this cause, entered March 2, 1914, came on to be heard pursuant to due notice to all the parties hereto who appeared by their respective solicitors, and was argued; and the court after the consideration of the motion, other motions, the returns, pleadings, evidence, arguments and briefs of counsel;

Ordered, adjudged and decreed as follows, viz.:

1st. That the following named companies, having duly entered their respective appearances on the hearing of said motion and participated in such hearing are hereby made parties defendant as of the date of their respective entries of appearances, namely: Wabash Railway Company, as successor to the Wabash Railroad Company, St. Louis-San Francisco Railway Company as successor to the St. Louis & San Francisco Railroad Company; Missouri Pacific Railroad Company, as successor to the Missouri Pa-

cific Railway Company; St. Louis, Iron Mountain & Southern Railway Company; the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company, as successor to St. Louis, Vandalia & Terre Haute Railroad Company, and St. Louis, Southwestern Railway Company. That because the Wabash Railway Company and the Chicago, Burlington & Quincy Railroad Company have lines of road on each side of the Mississippi River they are and shall be deemed in this decree and any accounting hereunder to be East Side Lines to the extent of their lines on the east side of that river and West Side Lines to the extent of their lines on the west side of that river.

2nd. That the motions of respondents to dismiss and to quash the order to show cause be and the same are hereby overruled and denied.

3rd. That the respondent companies and each of them and the above named individual defendants and their respective predecessors and each of them as representatives of said respective defendant companies on the Board of Directors of the defendant Terminal Railroad Association of St. Louis have continuously since the entry of said final order and decree, in contempt of this court, violated the terms thereof and are still violating its said terms—

(a) In that defendants, the Terminal Railroad Association of St. Louis and its subsidiary companies, are not acting in good faith as the impartial agents of the various proprietary lines.

(b) In that the proprietary lines other than the petitioner, through the domination and control of the Board of Directors of defendant, the Terminal Railroad Association of St. Louis and its subsidiaries, compelled the petitioners to pay the Terminal Railroad Association its transfer charges for supplying and operating facilities for the interchange of both through east bound and through west bound freight traffic between the east side lines and the west side lines.

(c) In that the defendants, the Baltimore & Ohio Southwestern Railway Company; the Chicago & Alton Railroad Company; the Chicago, Burlington & Quincy Railroad Company; the Cleveland, Cincinnati, Chicago & St. Louis Railway Company; the Illinois Central Railroad Company; the Louisville & Nashville Railroad Company; the Southern Railway Company; the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company; the St. Louis Southwestern Railway Company, and the Wabash Railway Company have not paid and are not now paying the reasonable transfer charges of defendant, The Terminal Railroad Association of St. Louis and its subsidiary companies on west bound through freight to the rails of said Missouri, Kansas & Texas Railway Company; St. Louis-San Francisco Railway Company; Missouri Pacific Railroad Company; the Chicago, Rock Island & Pacific Railway Company; the Chicago, Burlington & Quincy Railroad Company, and the Wabash Railway Company.

(d) In that the said Terminal Railroad Association has been issuing bills of lading or receipts taking the place of bills of lading usable for the transportation of through freight from points on its lines to distant points beyond its lines, and has been issuing passes usable by passengers riding on passes or tickets from points on its lines to distant points beyond its lines.

It is further ordered, adjudged and decreed that within sixty days from the date of the entry of this order, the said defendant companies and each of them cease and desist from violating the said final order and decree in the respects hereinbefore specified, and that upon the failure of them or either of them so to do and proof thereof this court will consider what further order or action should be taken.

It is further ordered, adjudged and decreed, that the East Side Lines, to-wit: The Baltimore &

Ohio Southwestern Railway Company, the Chicago & Alton Railroad Company, the Chicago, Burlington & Quincy Railroad Company, the Cleveland, Chicago, Cincinnati & St. Louis Railway Company, the Illinois Central Railroad Company, the Louisville & Nashville Railroad Company, the Southern Railway Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, the St. Louis, Southwestern Railway Company, and the Wabash Railway Company be and they are hereby required to pay within sixty days after the amount of same shall have been ascertained and determined for the use and benefit of said west side lines, to-wit: Missouri, Kansas & Texas Railway Company; St. Louis-San Francisco Railway Company; Missouri Pacific Railroad Company; Chicago, Rock Island & Pacific Railway Company; Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company, the total amount of the transfer charges of defendant Terminal Railroad Association of St. Louis and its subsidiary companies paid by said West Side Lines on west bound through freight of said East Side Lines to the rails of said West Side Lines at St. Louis, Missouri; from the date of the entry of said final decree, to-wit: March 2, 1914, to the date of this order; that such total amount shall be ascertained and determined in the manner hereinafter provided; that of such total amount each of said East Side Lines shall pay such proportion thereof as the transfer charges on West bound through freight handled by it paid by said West Side Lines bears to the total amount of the transfer charges on freight handled by all said East Side Lines; that each of said West Side Lines shall receive such proportion of said total amount as the charges on such west bound through freight paid by it bears to the total charges on all such west bound freight; that for the purpose of ascertaining and determining the

amount to be assessed against and paid by the said East Side Lines, and the amount payable by each thereof, and the respective amounts thereof payable to said West Side Lines respectively as herein provided Byron F. Babbitt, Esq., is hereby appointed the Special Master in this case to hear the testimony offered by the said East Side Lines and the West Side Lines as to such matters, to examine the evidence and to report to this court the facts and amounts to be ascertained pursuant to this paragraph of this decree.

It is further ordered, adjudged and decreed that the said West Side Lines have and recover of the respondents their costs herein laid out and expended in this proceeding." (Rec. 510-512.)

Thereafter, by proper steps duly and regularly taken, the East Side Lines, the Terminal Companies and their officers and directors, sought an appeal and supersedeas from said order to the Supreme Court of the United States. (Rec. 513-522.)

Circuit Judges Sanborn, Stone and Lewis, then constituting the District Court, there having been no intervening judicial deaths, on March 21, 1923, entered an order allowing the appeal to the Supreme Court of the United States, but refused to suspend the payment, by the East Side Lines to the West Side Lines, of the charges of the Terminal Companies on westbound through freight business passing over their lines pending this appeal. (Rec. 522-524.)

Being entirely dissatisfied with this situation the appellants, East Side Lines, Terminal Companies, their officers and directors, thereafter petitioned the Honorable Willis Van Devanter, a Justice of the Supreme Court of the United States, and assigned to the Eighth Circuit, for an appeal to the Supreme Court of the United States, and for an order of supersedeas pending the appeal. (Rec. 525-526.)

At the same time the appellant Terminal Companies and their individual appellants filed the following separate

ASSIGNMENT OF ERRORS:

"Now come the defendants, Terminal Railroad Association of St. Louis, St. Louis Merchants Bridge Terminal Railway Company, Wiggins Ferry Company, St. Louis Bridge Company, St. Louis Merchants Bridge Company, Henry Miller, Julius S. Walsh and S. D. Webster, in the above entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree ordered by this Honorable Court on the eighth day of February, nineteen hundred twenty-three.

These defendants aver that said decree so entered is erroneous and to the prejudice of these defendants in the following particulars:

First. In that the Court denied the prayer in the answer of these defendants to quash the order to show cause entered herein November 19, 1920, and denied the prayer of these defendants to abate and dismiss the contempt proceedings instituted in this cause.

Second. In that the Court was without jurisdiction to enter the decree or to make any further order in this cause because this cause was abated by the enactment of the Transportation Act of 1920 which amended Section Three of the Interstate Commerce Act by adding a new paragraph which reads as follows:

'(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal

facilities, including the main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirements, or just compensation for such use, or both, as the case may be.'

Third. In that the Court was without jurisdiction to consider any of the alleged grievances of the parties instituting the said proceedings, each and all of which come within the scope of the power of the Interstate Commerce Commission as now existing under the Interstate Commerce Act and its several amendments, including the Transportation Act, 1920.

Fourth. In that the said decree permitted the parties instituting the proceedings, out of which said decree grew, to do so when the United States of America was the only party complainant herein and neither initiated nor joined in said proceedings.

Fifth. In that the said decree and the proceedings out of which the said decree grew were not germane to the controversy initiated by the United States of America and conducted alone by it, or within the scope of the relief claimed by the said United States of America or within the scope of the final decree entered herein March 2, 1914, as modified by the decree entered herein February 7, 1917.

Sixth. In that the Court finds the defendants referred to in the third clause of the decree as respondent companies and as individual defendants have violated the final order and decree herein and are still violating the terms of said final order and decree.

Seventh. In that said decree takes possession of, and undertakes to determine, controversies between common carriers, all subject to and governed by the Interstate Commerce Act and other Acts relating to, establishing and governing the Interstate Commerce Commission, and the duties and obligations of those companies subject thereto, such controversies being exclusively within the jurisdiction of the Interstate Commerce Commission and outside of the jurisdiction of the said District Court.

Eighth. In that the decree in this case and the several paragraphs thereof in effect fixes the divisions among common carriers, a matter which under the Interstate Commerce Act is exclusively within the jurisdiction of the Interstate Commerce Commission.

Ninth. In that said decree attempts to regulate the through rates established by the railroad companies instituting these proceedings, and the railroad companies, defendants thereto, and the division thereof, matters wholly within the jurisdiction of the Interstate Commerce Commission and outside of the jurisdiction of the District Court.

Tenth. In that the said decree attempts to fix the point of interchange of traffic moving from East of the Mississippi River through St. Louis to points beyond, when such interchange point must, under the Interstate Commerce Act, be fixed either by agreement of the carriers concerned or by the Interstate Commerce Commission, a matter wholly within the jurisdiction of the Interstate Commerce Commission and outside of the jurisdiction of the said District Court.

Eleventh. In that said decree attempts to regulate through rates and divisions thereof established by the President of the United States during the period of Federal Control and continued in effect by the Transportation Act, 1920.

Twelfth. In that the decree in effect construes the decree of March 2, 1914, as amended February 7, 1917, as forbidding the Terminal Association to issue bills of lading and passes, whereas said decree of March 2, 1914, so amended was too indefinite to advise said Association that such was the purpose or intent thereof, and in that the Court erred in finding that said Terminal Association was not the impartial agent of the various proprietary lines.

Wherefore, these appellants pray that said decree be reversed and that said Court be ordered to enter a decree reversing its decision in said cause." (Rec. 530-532.)

At the same time the appellants, the East Side Lines and their individual appellants, filed a separate assignment of errors:

"The appellants, The Baltimore & Ohio Southwestern Railroad Company, R. N. Begien, The Chicago & Alton Railroad Company, W. G. Bierd, Chicago, Burlington & Quincy Railroad Company, E. P. Bracken, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, H. A. Worces-

ter, Illinois Central Railroad Company, C. M. Kittle, Louisville & Nashville Railroad Company, John Fitzgerald, Southern Railway Company, John B. Munson, The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, Benjamin McKeen, St. Louis Southwestern Railway Company, Daniel Upthegrove, Wabash Railway Company, J. E. Taussig, hereby severally assign the following errors severally committed by the Court in its decree entered herein February 8, 1923. For purposes of brevity, the following will be hereinafter described under the title, 'West Side Lines,' viz., Missouri, Kansas & Texas Railway Company, St. Louis-San Francisco Railway Company, Missouri Pacific Railroad Company, and The Chicago, Rock Island and Pacific Railway Company, and the following will be hereinafter described under the title, 'East Side Lines,' The Baltimore & Ohio Southwestern Railroad Company, The Chicago & Alton Railroad Company, Chicago, Burlington & Quincy Railroad Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Illinois Central Railroad Company, Louisville & Nashville Railroad Company, Southern Railway Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, St. Louis Southwestern Railway Company, and Wabash Railway Company. The appellants now allege that the decree so entered is erroneous and to the prejudice of the appellants severally in the following particulars, that is, to-wit:

1. In that the motion of the appellants referred to in the second clause of the decree as respondents and entered herein December 14, 1920, to dismiss and quash the order to show cause en- [fol. 908] tered herein November 12, 1920, is overruled and denied.

2. In that the said decree permitted the parties instituting the proceeding, out of which said decree grew, to do so when the United States of

America was the only party complainant herein and neither initiated nor joined in said proceeding.

3. In that the paragraphs severally of said decree and the proceedings out of which the said decree grew were not germane to the controversy initiated by the United States of America and conducted alone by it, or within the ambit of the relief claimed by the said United States of America.

4. In that the paragraphs severally of said decree were not within the ambit of the final decree entered herein March 2, 1914, as modified by the decree entered herein February 7, 1917.

5. In that the Court was without jurisdiction to consider any of the alleged grievances of the parties instituting the said proceedings, each and all of which come within the ambit of the power of the Interstate Commerce Commission as now existing under the Interstate Commerce Act and its several amendments, including the Transportation Act, 1920.

6. In that the Court finds the appellants referred to in the third clause of the decree as respondent companies and as individual defendants have violated the final order and decree herein and are still violating the terms of said final order and decree.

7. In that the said decree finds that the appellant corporations herein, through the domination or control of the board of directors of the Terminal Railroad Association and its subsidiaries, have compelled the petitioners to pay the Terminal Railroad Association its transfer charges for supplying and operating facilities for the interchange of both through East-bound and through West-bound freight traffic between the East Side Lines and the West Side Lines, or that

the same has been done in violation of the said final order and decree or in contempt of the Court.

8. In that the decree finds that the appellants herein, that is to say, the East Side Lines, are not paying the reasonable charges of the Terminal Railroad Association of St. Louis and its subsidiary companies on West-bound through freight to the rails of the West Side Lines, in violation of said final decree or in contempt of Court and requiring said East Side Lines to make such payment from and after the date fixed in the decree.

9. In that said decree provides that sixty days from the date of the entry thereof the defendant companies, the East Side Lines, shall cease and desist from doing the things adjudged as in violation of said final decree and in contempt of Court specified above.

10. In that said decree provides that the East Side Lines shall be and they are thereby required to pay, within sixty days after the amount of same shall have been ascertained and determined, for the use and benefit of the West Side Lines and the Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company, the amount of the transfer charges of the Terminal Railroad Association of St. Louis and its subsidiary companies, paid by said West Side Lines on West-bound through freight of said East Side Lines to the rails of said West Side Lines at St. Louis, Missouri, from the date of the entry of said final decree, March 2, 1914, to the date of this order, and providing that such amount shall be ascertained and determined by reference as thereinafter provided, and that of such total amount each of said East Side Lines shall pay such proportion thereof as the transfer charges on West-bound through freight handled by it, paid by said West Side Lines, bears to the total amount of the transfer charges on freight handled by all

of said East Side Lines, and in providing that each of said West Side Lines and said Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company shall receive such proportion of said total amount as the charges on such West-bound through freight paid by it bears to the total charges on all such West-bound through freight; and further providing that for the purpose of ascertaining and determining the amount to be assessed against and paid by the East Side Lines, and the amount payable by each thereof and the respective amounts thereof payable to said West Side Lines and said Chicago, Burlington & Quincy Railroad Company and Wabash Railway Company, Byron F. Babbitt be appointed Special Master to hear the testimony offered by the said East Side Lines and said West Side Lines as to such a matter, to examine the evidence and report to the Court the facts and amounts to be ascertained pursuant to this paragraph of this decree, but this assignment of error is not directed to the inclusion by the Court of Chicago, Burlington & Quincy Railroad Company and Wabash Railway Company in such rights as the West Side Lines may have.

11. In that said decree further orders, adjudges and decrees that the West Side Lines have and receive of the respondents their costs therein laid out and expended in this proceeding.

12. In that the paragraphs severally of said decree takes possession of and undertakes to determine controversies between common carriers, all subject to and governed by the Interstate Commerce Act and other Acts relating to, establishing and governing the Interstate Commerce Commission, and the duties and obligations of those companies subject thereto, such controversies being exclusively within the jurisdiction of the Interstate Commerce Commission and outside of the jurisdiction of the said District Court.

13. In that said decree attempts to regulate the through rates established by the railroad companies instituting this proceeding, and the railroad companies, respondent thereto, and the division thereof, matters wholly within the jurisdiction of the Interstate Commerce Commission and outside of the jurisdiction of the District Court.

14. In that said decree attempts to regulate through rates and divisions thereof established by the President of the United States during the period of Federal Control and continued in effect by the Transportation Act, 1920.

15. In that the decree in this case and the several paragraphs thereof in effect fixes the divisions among common carriers, a matter which under the Interstate Commerce Act is exclusively within the jurisdiction of the Interstate Commerce Commission.

16. In that the said decree attempts to fix the point of interchange traffic moving from East of the Mississippi River through St. Louis to points beyond, when such interchange point must under the Interstate Commerce Act be fixed either by agreement of the carriers concerned or by the Interstate Commerce Commission, a matter wholly within the jurisdiction of the Interstate Commerce Commission and outside of the jurisdiction of the said District Court.

17. In that the decree in this case requires the East Side Lines to pay to the West Side Lines the entire transfer charges on west-bound through traffic, whereas, the evidence in this case shows that on much of the traffic so transferred, the East Side Lines have in effect borne, and are now bearing, some part of the said transfer charge.

18. In that said decree in effect requires a readjustment of all rates and divisions pertaining to traffic passing from East St. Louis to the lines entering St. Louis from the West wherever such

traffic may have originated and necessarily, therefore, involving a readjustment of all rates and divisions from points East of the Mississippi River at St. Louis and points West of St. Louis, and involves the rights of the carriers not parties to the cause, all said matters being solely within the jurisdiction of the Interstate Commerce Commission and outside of the jurisdiction of the said District Court.

19. In that the decree in effect awards to the West Side Lines sums as for moneys paid to the use of the East Side Lines, such relief not having been predicated upon the allegations of the motion of the East Side Lines, and not having been sought or demanded by them.

20. In that the decree requires the payment of money by certain of the defendants in the original cause to certain other defendants in said original cause in a proceeding wherein it is sought to have certain defendants adjudged in contempt of the decree of March 2, 1914, as amended February 7, 1917.

Wherefore, these appellants pray that said decree be reversed and that said Court be ordered to enter a decree reversing its decision in said cause." (Rec. 526-529.)

Thereafter Mr. Justice Van Devanter caused to be entered an

ORDER ALLOWING AN APPEAL AND SUPERSEDEAS

to all the appellants. The supersedeas being conditioned upon giving certain specified bonds, which were duly and regularly executed and filed by the appellants, and thereafter the requisite procedure was followed so that this case is now before this Court awaiting final determination. (Rec. 534, et seq.)

BRIEF OF ARGUMENT

I

The Court was Without Jurisdiction to Make any Further Order in this Cause Affecting the Practices or Operations of These Terminal Companies Since the Enactment of the Transportation Act of 1920, Amending Section Three of the Interstate Commerce Act by Adding the Following New Paragraph, Abated This whole Litigation and Gave the Interstate Commerce Commission Original and Exclusive Jurisdiction Over the Present and Future Activities of These Terminal Companies:

"(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such

use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirements, or just compensation for such use, or both, as the case may be." (Rec. 530.)

The Seventh Paragraph of the first opinion of this Court, 224 U. S. 383, rendered April 22, 1912, reads as follows:

"To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission." (Rec. 49.)

The final decree of March 2, 1914, which the appellants have been found guilty of violating, provided in the Sixth Paragraph as follows:

"Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission." (Rec. 70.)

This Court will note that both in its opinion, as well as in the decree which was intended to follow the opinion, it is expressly provided that the decree should contain nothing to be taken "to affect in any wise or

at any time the power of the Interstate Commerce Commission * * * or any other power conferred by law upon such Commission."

We contend that the Transportation Act of 1920 by law has conferred upon the Interstate Commerce Commission original and exclusive jurisdiction over these Terminal Companies since the above quoted new paragraph, amending Section Three of the Interstate Commerce Act, gives the Commission power to fix the terms and conditions under which the facilities of all terminal companies, including these appellant Terminal Companies, may be used by carrier lines engaged in a general transportation business.

The decree of March 2, 1914, provided the procedure and method by which carrier lines might use the terminal facilities of these Terminal Companies, but since Congress has seen fit to confer authority upon the Commission, the same authority which heretofore existed in the Court, this subsequent legislation must under the decisions abate and render empty the decree of the Court which dealt with the same subject matter.

Subsequent legislation concerning pending litigation will control the litigation from the effective date of its enactment. The Transportation Act of 1920 is such subsequent legislation. It became effective while this litigation was pending, and was effective when the order undertaking to punish these appellants for contempt was entered on February 8, 1923, and consequently the Court had no power in Paragraph "D" of said order to enjoin these Terminal Companies from "using bills of lading or receipts taking the place of bills of lading usable for the transportation of through freight from points on its lines to distant points beyond its lines, and from using passes usable by pas-

sengers riding on passes and tickets from points on its lines to distant points beyond its lines." (Rec. 511.)

Nor has the Court any jurisdiction to enforce against these Terminal Companies any of the provisions of the final decree of March 2, 1914. This whole subject matter rests now exclusively with the Interstate Commerce Commission.

In American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 66 L. Ed. 189, this Court held that Section Twenty of the Clayton Act became effective when the case was on appeal to the Circuit Court of Appeals. The plaintiff was suing to enjoin a conspiracy interfering with the operation of its plant. This Court followed the case of Duplex Company vs. Dearing, 254 U. S. 443, and laid down the doctrine that as relief by injunction operates in the future the right to such injunctive relief must be determined by Section Twenty of the Clayton Act relating to injunctions, which was in effect when the case was heard and controlled in so far that decrees entered after its passage should conform to its provisions.

The law sustaining our insistencies is to be found in cases dealing with legislation becoming effective after a final decree and mandate and creating new rights or changing the character of the situation confronting the Court when the mandate was issued.

The leading case upon this subject is Pennsylvania v. Wheeling Bridge Company, 18 How. 421.

As our main reliance is upon the principles enunciated in this case we will take the liberty of attempting a full statement.

In 1849 the State of Pennsylvania filed a bill to enjoin the construction of a bridge across the Ohio River at Wheeling upon the ground that it would

obstruct navigation, but while the litigation was pending the bridge was completed so that a supplementary bill was filed asking for an abatement of the bridge as a public nuisance.

In 1852 the Court entered a decree, after a full hearing upon the evidence, that the bridge was an illegal structure and must be abated unless so modified as to cease to be an obstruction to navigation. (13 How. 518.)

After certain other proceedings were had another decree was later entered providing that the bridge should be abated as a public nuisance unless specified alterations were made to the structure.

After the final decree ordering the abatement of the bridge, on August 31, 1852, Congress passed an Act expressly declaring the bridge as built a lawful structure. Thereafter, the defendant Bridge Company refused to obey the decree ordering the removal of its bridge, and ignored an injunction forbidding it to make some necessary reconstruction unless in conformity with the requirements of the decree.

The plaintiff filed several motions to enforce the original decree by process of attachment for contempt, and asked that the defendant be punished for contempt for disobedience to the injunction, while at the same time the defendant moved that the injunction be dissolved because rendered inoperative by reason of subsequent Congressional legislation.

This Court, after referring to the bill of complaint, the decree and the Act of Congress, said:

> "The defendants rely upon this Act of Congress as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the Court previously rendered, declaring it an obstruction to navigation." (18 How. 421, 429, supra.)

The Court set forth the grounds and principles upon which the decision had been rendered declaring the bridge an obstruction to navigation, and declared that the bridge, without Federal authorization, was an illegal structure. Referring again to the Act of Congress the Court said:

> "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous Acts of Congress, they are to be regarded and modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law." (Id. 430.)

As pertinent to the matter under discussion the Court further said:

> "But it is urged, that the Act of Congress cannot have the effect and operation to annul the judgment of the Court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the Court to enforce it.
>
> The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by Acts of Congress.
>
> But, although this right of navigation be a public right common to all, yet, a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damage; or, to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to

damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under the regulation of Congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the Court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree directing the abatement of the obstruction is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the Court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted but that the defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?" (Id. 431-432.)

Finally, after holding the Act constitutional, the Court reached the following conclusion:

"Upon the whole, without pursuing the examination further, our conclusion is, that, so far as re-

spects that portion of the decree which directs the alteration or abatement of the bridge, it cannot be carried into execution since the Act of Congress which regulates the navigation of the Ohio River, consistent with the existence and continuance of the bridge; and that this part of the motion, in behalf of the plaintiff, must be denied. But that, so far as respects that portion of the decree which directs the costs to be paid by the defendants, the motion must be granted." (Id. 435-436.)

Discussing the effect of subsequent legislation upon the injunctive part of the decree, this Court said:

"The object of the injunction was to suspend the work, together with the great expenses attending it, until the determination of the question by this Court as to the force and effect of the Act of Congress, in respect to the execution of the decree. The defendants did not appear upon the notice given of the motion for the injunction, and it was, consequently, granted without opposition.

After the writ was served, it was disobeyed, the defendants proceeding in the reconstruction of the bridge, which they had already begun before the issuing or service of the process.

A motion is now made for attachments against the persons mentioned for this disobedience and contempt.

A majority of the Court are of opinion, inasmuch as we have arrived at the conclusion that the Act of Congress afforded full authority to the defendants to reconstruct the bridge, and the decree directing its alteration or abatement could not, therefore, be carried into execution after the enactment of this law, and inasmuch as the granting of an attachment for the disobedience is a question resting in the discretion of the Court, that, under all circumstances of the case, the motion should be denied." (Id. 436.)

Mr. Justice Daniel, in a concurring opinion, made this apposite statement:

"In what has been done by Congress, I can have no doubt that they have acted wisely, justly and strictly within their constitutional competency. By their action they have completely overthrown every foundation upon which the decrees of this Court, the orders of the Circuit Judge, and every motion purporting to be based upon these or either of them, could rest. I am, therefore, of the opinion that each and every motion submitted by the complainant under color of the decrees heretofore pronounced in this cause, or of the injunction awarded by the judge of the circuit court, should be overruled; that the injunction awarded as aforesaid should be dissolved, and the bill praying for that injunction should be dismissed; and that in each instance the defendants should be decreed their costs." (Id. 458.)

The principle upon which this case rests is that legislation passed after a final decree and mandate supersedes them and renders them ineffective; that the litigant in whose favor any rights are created is entitled to their benefit and protection; that the mandate interposed between the enjoyment of such rights or interfering with the effect of the new legislation is automatically obliterated and made inoperative.

The analogy between this case and our case is so perfect as to make the law of the one a direct precedent for the decision of the other. Both cases dealt with matters of public interests and not with private rights. In each case this Court found an existing situation to be illegal and ordered its termination, except under certain conditions, which subsequent legislation legalized, and which was legal at the time the final decree was rendered.

In neither case is the correctness of either case decided by this Court drawn in question. In both cases subsequent legislation operates upon an executory pro-

vision of the order, and the order is superseded because the decisions upon which it rests have been supplanted with a new foundation.

Our painstaking search of the reports shows that this Court has never overruled nor said anything to discredit the principles announced in this Wheeling Bridge Case, upon which we rely, and this case has been several times mentioned with approval, notably in the following cases:

The Clinton Bridge, 10 Wall 454;
Bridge Co. v. United States, 105 U. S. 470;
Mills v. Green, 159 U. S. 651-655;
Hodges v. Snyder, 261 U. S. 600, 67 L. Ed. 458-460.

The Clinton Bridge Case, *supra,* was a suit to enjoin a railroad company from operating a bridge across the Mississippi River. When the case came on to be finally heard the defendant objected to the introduction of any evidence on the grounds that since the bridge had been built Congress had passed an Act declaring it a legal structure. The objection was sustained. This Court, after calling attention to the fact that the only difference between the case at bar and the Wheeling Bridge Case, supra, was that the case at bar was pending undetermined when the Act of Congress was passed, while in the Wheeling Bridge Case a decree had been entered against the maintenance of the bridge at the time of the Congressional enactment.

This Court, in affirming the decision of the lower Court, said:

> "In the present case the act of Congress having passed pending the suit, it gave the rule of decision for the Court at the final hearing upon the same principle that the act in the Wheeling Bridge

case staid the execution of the decree directing its abatement." (Id. 463.)

In the case of Bridge Company v. United States, *supra,* this Court said that in the Wheeling Bridge Case it was held:

> "Congressional assent to a substantial obstruction was recognized as sufficient to prevent the execution of a decree of this Court requiring the abatement of what, but for this assent, would have been, in the judgment of the Court, a public nuisance." (Id. 655.)

In the case of United States v. Elliott, 74 Fed. 92-94, a suit was brought against defendant, under Act of Congress of February 25, 1885, to prevent the unlawful occupancy of public lands. The Appellate Court finally decided that the lands enclosed by defendant were public lands and the case was remanded to the trial Court for further proceedings. At this stage Utah became a State and the land in question, by the Utah Enabling Act, ceased to be a part of the public lands of the United States. The District Court of Utah held that the case fell within the principle of the Wheeling Bridge Case, and "the right to abate it" (the unlawful enclosure) "is therefore lost."

These appellants are not complaining of any error of the previous decisions of this Court, and are not seeking to have the case reopened for the purpose of trying again any question of law or fact heretofore decided, or for any other purpose, but they claim that the executory provisions of the decree, which related to the future and which were based on the assumption that these Terminal properties ought to remain under the direction and control of the Federal Court have been superseded by subsequent legislation, and that whatever in this case was declared illegal has now be-

come legal so that for a Federal Court to retain jurisdiction and make further orders in this case relative to the operations and practices of these Terminal Companies will be tantamount to a disregard of an Act of Congress.

While the case of United States ex rel. v. Marshall, 112 Fed. 428, was pending on appeal from an adverse decision in an action to eject a mining company from the land of the plaintiff used for the operation of a tramway, the defendant brought a suit to condemn the right of way therefor and obtained an order permitting it to occupy the property pending the litigation.

The mandate in the ejectment suit directed that such execution and proceedings be had in the Court below "as according to right and justice and the laws of the United States ought to be had."

The defendant in the ejectment suit moved in the Court below to stay the issuance of any writ of restitution until the final determination of the condemnation proceedings. This motion was sustained. In deciding that the Trial Court had jurisdiction to consider the motion to stay the writ of restitution Judge Adams, of this, the Eighth Circuit, said:

> "Ordinarily the mandate of this Court requiring the enforcement of a judgment of the Trial Court must be specifically obeyed, but when new rights have intervened after the original judgment and pending an appeal, like, for example, accord and satisfaction, payment of the judgment debt, adjudication in bankruptcy, and discharge of the debtor from the judgment debt, such rights, if of equitable cognizance, not only justify but require, the Trial Court to afford relief, either by bill in equity, or, possibly, by motion to stay the enforcement of the judgment itself, if the same is necessary to prevent irreparable injury." (430.)

The present case is one where legislation becoming effective after final decree and mandate has altered the situation which a directory and executory provision of the mandate was intended to meet.

The principle enunciated in the Wheeling Bridge Case, and followed in the Clinton Bridge Case, that an Act of Congress stayed the execution of a decree, was applied by the Supreme Court of Massachusetts in the case of Newton Rubber Works v. De La Casas, 84 N. E. Rep. 119 (198 Mass. 156), which was a proceeding to punish defendants for a disobedience of a final decree entered against them in accordance with a decision of the Supreme Court whereby they were enjoined from maintaining a dam or other obstruction in a certain stream. The defense was the acquisition of new rights under subsequent legislation pursuant to which there was a right to maintain the dam. In sustaining this defense the Court, on page 120, said:

> "This statute enacted after the entry of the decree, gave the respondents ample authority to do all that they are alleged to have done. The question is presented whether, acting under the new legislative authority, they can be found guilty of contempt of Court because what they did had been enjoined by a decree made before there was a law permitting such action. We are of opinion that they cannot. After the passage of the statute they could act under it if they kept within its provisions. If the effect of the statute was doubtful, or if they chose to do so for any reason, they properly might bring a bill of review, as was done in Sawyer vs. Davis, 136 Mass. 239, 49 Am. Rep. 27, to have the decree vacated. But this was unnecessary. For if they acted in good faith, understanding that the new law was to give them authority which would relieve them from the restraint of the

decree, and if in fact the statute gave them such authority, there would be no ground for holding them guilty of wilful disobedience in contempt of Court.

This subject was carefully considered in State of Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. (U. S.) 421, 15 L. Ed. 435, and a decision was made which fairly covers the present case. This decision, although at first agreed to by only a majority of the Court, has since been recognized and approved repeatedly.

Railroad Company v. Fuller, 17 Wall. (U. S.) 560-569;

Stockdale v. Insurance Companies, 20 Wall. (U. S.) 323;

Mills v. Green, 159 U. S. 651-655;

The Clinton Bridge, 10 Wall. (U. S.) 454.

See, also, to the same point, Linn County v. Hewitt, 55 Iowa, 505, 8 N. W. 340."

To the same general effect is the case of Commissioners of Highway v. People, ex rel., etc., 31 Illinois, 97, holding that where a peremptory writ of mandamus was awarded against Commissioners of Highways, requiring them to open a certain road, it was sufficient excuse on the part of the Commissioners, for not obeying the writ, that after the writ was awarded, and before it was issued and served, the road thereby directed to be opened was vacated by an order of the same Commissioners, made in pursuance of authority so to do, conferred upon them by statute.

Actually the very principle for which we contend falls within the scope of the decision of Mr. Chief Justice White in the second appeal of this case, 236 U. S. 194, 206-209, wherein it was declared that a mandate should not be so construed and executed as to bring about an antagonism or conflict with existing laws applicable to the situation, and the decision of a Court

is not to be regarded as destroying one set of public rights upon the theory of protecting another set, nor as proposing to correct an abuse of one statute by conferring authority to disregard another, nor while exerting the authority of enforcing one statute, assuming the power of setting aside the provisions of another statute.

We contend that the decision of this case first decided by Mr. Justice Lurton, 224 U. S. 383, and the decision of Mr. Chief Justice White in the second appeal, 236 U. S. 194, are direct authorities in support of the proposition that the Interstate Commerce Commission, after the enactment of the Transportation Act of 1920, has exclusive jurisdiction over the activities of these Terminal Companies, since these decisions hold the Interstate Commerce Commission shall have such jurisdiction as might be conferred at any time thereafter by Congress.

In the New England Divisions Case, 261 U. S. 184, Mr. Justice Brandeis declared: "Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. (Railroad Commission v. C. B. & Q. R. R., 257 U. S. 563, 585) * * * and to attain it, new rights, new obligations, new machinery were created. The new provisions took a wide range."

In a foot-note to this opinion Mr. Justice Brandeis stresses that among the important features of this Act is the new paragraph added to Section Three of the Interstate Commerce Act, upon which we rely, providing for use by one carrier of the terminal facilities of another carrier.

This opinion has been cited with approval in the latest expressions of this Court by Mr. Chief Justice Taft, delivered January 7, 1924, in the case of Dayton-

Goose Creek Railway Company v. United States, et al, wherein he approvingly refers to this opinion of Mr. Justice Brandeis, as well as the case of Railroad Commission v. C. B. & Q. R. R., 257 U. S. 563, *supra*, as follows:

> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation. * * * To achieve this great purpose it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise * * * their joint use of terminals."

In holding that these Terminal Companies, while operated through joint stock ownership of the Proprietary Lines, constituted a violation of the Sherman Anti-Trust Act, this Court, in 224 U. S. 383, *supra*, bottomed its reasoning upon local conditions, saying:

> "The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter, St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company."

Then the Court continues:

> "This control and possession constitute such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the east or west, as to be both an illegal restraint and an attempt to monopolize."

Accordingly, the case was remanded to the District Court with specific directions to amend the contract between the Terminal Companies and the Proprietary Lines so as to eliminate the contractual provisions bringing the combination within the inhibition of the

statute. There were seven of these specific provisions, the first six being directory, and the seventh explanatory and admonitory. The first provision was addressed to the admission of any existing or future railroad to joint ownership or control of the combined Terminal properties; the second provided for the use of the Terminal properties by any other railroad without becoming a joint owner; the third eliminated the requirement that the Proprietary Companies exclusively use the facilities of these Terminal Companies; the fourth provided for the abolition of the practice of billing to East St. Louis, or other junction points, and then billing traffic destined to St. Louis or points beyond; the fifth provided for the abolition of any or so-called arbitrary charge for the use of the Terminal facilities on traffic existing within the so-called hundred-mile area that was applied on traffic of like character originating outside of that area; the sixth provided for an appeal to the District Court for an order permitting the use or joint ownership of the Terminal properties by any company, and the seventh endeavored to make it too plain for argument, so as to avoid any possible misapprehension, that nothing could be decreed affecting "in any wise or at any time the power of the Interstate Commerce Commission * * * or any other power conferred by law upon such Commission." (224 U. S. 383.)

The reason for a legal requirement ceases when the requirement itself passes out of existence. The reason for the foregoing directions and admonitions have been wiped out by legislative enactment, and, therefore, any railroad at this time which desires to avail itself of the facilities of these Terminal Companies should apply, not to the District Court as provided in

the decree of March 2, 1914, but must apply to the Interstate Commerce Commission.

This new and comprehensive legislative policy places these Terminal Companies under the exclusive, original control of the Interstate Commerce Commission.

This old litigious tree was killed by the Act of Congress. It ought to be finally and decisively buried by this Court, and no more appropriate epitaph could be suggested than "Requiescat In Pace."

II.

The Whole Complaint of the West Side Lines That the Appellants Violated the Orders and Decrees of This Court Is Within the Exclusive, Original Jurisdiction of the Interstate Commerce Commission.

The various allegations against these appellants in that the Terminal Companies are not common carriers; that they file tariffs and concur in division sheets filed with the Interstate Commerce Commission; that they issue passes for use on passenger trains coming or going on or off their lines; that they issue bills of lading like trunk line railroads; that they handle express and the United States mail like trunk line railroads; and that their rails are extensions of the rails of the Proprietary Lines, taken in the aggregate make a smoke screen for the real purpose of the West Side Lines to compel the East Side Lines to change the present method of paying these Terminal Companies for their transfer services so that the West Side Lines will not have to pay these charges on a large portion of the through freight business at the St. Louis gateway.

From our statement this Court will have observed

that the present practice of breaking the rate on all through freight business on the east bank of the Mississippi River has been in existence since 1877 when the completion of a bridge at Louisiana, Missouri, by the Chicago & Alton Railroad Company compelled the West Side Lines, for competitive reasons, to absorb the charges of these Terminal Companies.

(Maxwell, Rec. 416-417;)
(Sudborough, Rec. 424-427.)

The origin of this method of dividing the through rate by the East and West Side Lines cannot be denied, and was admitted by Vice-President Haile of the Missouri, Kansas & Texas Railroad Company. (Rec. 264.)

The public has no concern, and is not interested, in this controversy as was frankly admitted by Vice-President Perkins of the Missouri Pacific Railroad Company, as follows:

> "Q. The real controversy as you understand it is, how and in what way you shall divide up the the Terminal charge, isn't it?
>
> A. The real controversy so far as the Traffic Department is concerned, and that end I have been handling, is who shall pay for the service rendered from one side of the river to the other side of the river.
>
> Q. Somebody has to pay, hasn't it? That is evident, isn't it?
>
> A. I should say so.
>
> Q. The Terminal does the work and somebody has to pay the Terminal?
>
> A. In some shape or form.
>
> Q. It don't make any difference to the shipper who pays for it?
>
> A. Not at all.
>
> Q. So the public is not concerned in this controversy?
>
> A. No." (Rec. 286.)

The resolution adopted at a meeting of the Board of Directors of the Terminal Railroad Association May 10, 1920, is a fair and precise statement of the nature and character of this controversy:

> "Whereas, controversy exists between the West Side Lines and the East Side Lines as to the payment or assumption of charges for transfer of freight from one side of the river to the other, which has been brought to the attention of this Board, and
>
> Whereas, the West Side Lines have manifested their opinions that said controversy may be adjusted by what they term a compliance with the decree of the Court in the case of the United States against the Association, and others, under the Sherman Act, and have threatened to involve the Association in further proceedings in that case upon the supposed failure to comply with said decree,
>
> Therefore, Be it Resolved: That this Association in its independent capacity is in no way interested as to which of the Proprietary Lines should bear such charges, and should not in any manner participate in said controversy.
>
> Be it Further Resolved: That the procedure of this Association in compliance with said decree, and the decisions of the Supreme Court of the United States upon which it was predicated, has in all things been pursuant to the advice of its general and special counsel, and is therefore, believed to be correct." (Rec. 240.)

These Terminal Companies have nothing to do with the origination of the tariffs providing for through freight business passing over their lines. The Proprietary Lines, and the other trunk line railroads using their facilities, voluntarily and agreeably file these tariffs with the Interstate Commerce Commission, and these Terminal Companies have filed concurrences, as

required by the Interstate Commerce Commission, since 1908. (Stith, Rec. 334.)

The only tariffs originated and filed with the Interstate Commerce Commission by these Terminal Companies cover freight movements originating and ending on their own rails. (Stith, Rec. 341.)

As provided in the tariffs filed by the trunk line railroads, and as agreed upon in division sheets, these Terminal Companies are paid for the business they handle. (Haile, Rec. 257-265; Maxwell, Rec. 416-418; Stith, Rec. 342-343; Sudborough, Rec. 423-430.)

The Seventh Paragraph of specific directions of this Court, in 224 U. S. 383, and the Sixth Paragraph of the decreetal order of the District Court, of March 2, 1914, provide that

> "Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission." (Rec. 70.)

Manifestly, the tariffs and concurrences of these Terminal Companies must be filed with the Interstate Commerce Commission, and the Interstate Commerce Commission, under the express provisions of the Interstate Commerce Act, has jurisdiction over their rates and charges.

The law bearing upon this subject is as follows:

> **"INTERSTATE COMMERCE ACT**
>
> SECTION 1.
>
> (1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment.

(3) Wherever the word 'carrier' is used in this Act it shall be held to mean 'common carrier.' The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation,

with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

(10) The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

SECTION 3.

(3) All carriers engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and

equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

SECTION 6.

(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and

copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carriers in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: **Provided**, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: **Provided, further**, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) The names of the several carriers which

are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(5) Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

(6) The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SECTION 7.

That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

SECTION 15.

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated.

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly pref-

erential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance herewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate or delivering line, and any other fact or circumstance which would ordinarily without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

"7. Whenever there shall be filed with the Commission any schedule stating a new individual, or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given authority, either

upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid

such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decided the same as speedily as possible.

SECTION 15a.

(1) When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

SECTION 20a.

(1) That as used in this section the term 'carrier' means a common carrier by railroad (except a

street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

SECTION 209

(a) When used in this section the term 'carrier' means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected with a railroad at any time under Federal control."

The opinion of Judge Sanborn, citing the law and authorities, conclusively settles this proposition, wherein he says:

"But in my opinion it is not a violation of the final decree for the Terminal Company to become a party to through tariffs and division sheets upon which its charges are specified made by the line hauling roads and concurred in by it. United States v. Union Stock Yards Company et al., 226 U. S. 286, 303, 304, 305, 306; St. Louis Chamber of Commerce v. B. & O. R. R. Co., 57 I. C. C. 639, 640, 641, 644, 645, 646, 653, 654.

Nor am I persuaded that the transportation of passengers and freight and of the cars carrying them across or over the property and rails of the Terminal Company from the ends of the rails of the West Side Lines to the ends of the rails of the East Side Lines, and from the ends of the rails of the East Side Lines to the ends of the rails of the West Side Lines, or in other directions over its property and rails constitutes any violation of the final decree. The Terminal undoubtedly has the right under that decree to carry on 'the trans-

action of a terminal business such as supplying and operating facilities for the interchange of traffic between roads and the distributing of traffic for the carrying companies, switching, storing and the like.' The second paragraph of the contract as it now stands after its modification by direction of the Court still requires the Terminal to maintain 'a freight station or stations, additional main and sidetracks, switches and turnouts whenever the same may be necessary, suitable in size and location and manner of construction; also to perform promptly and efficiently the work of receiving, handling and transporting all passenger and freight traffic of the several Proprietary companies of St. Louis and East St. Louis, and of other railroad companies which may be hereafter, under the terms of this agreement, admitted to a joint use of said Terminal property.' The property of the Terminal lies between the east and west line hauling railroads. The receipt from the line hauling railroads of passengers and freight destined to points on its rails, the delivery of them to such points, the receipt of passengers and freight originating on its rails destined to points on or beyond the rails of the line hauling roads is also a part of its legitimate business as a terminal company. In the conduct of this business as a terminal company it necessarily engages in the transportation of passengers and property and is also a transportation company and a common carrier. Section 1 of the Act to Regulate Commerce, Section 8563, U. S. Comp. Stat. 1918. Transportation over its property on its rails of the freight and passengers delivered to it from the line hauling roads on one side of its property destined to or beyond the rails of the line hauling roads on another side of its property, is a substantial, perhaps the chief part of its legitimate business as a terminal company. The receipt and delivery of those passengers and that freight from and to the line hauling roads is indispensable to

the conduct of its legitimate business as a terminal company." (Rec. 499-500.)

Moreover, this Court, in the case of Director General v. Viscose Company, 254 U. S. 498, at page 504, in discussing the jurisdiction of the Commission over rate matters, said.

> "The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission, need not be repeated and cannot be overstated."

To the same effect are the following cases:

Pennsylvania Co. v. International Coal Co., 230 U. S. 184;

Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S. 247;

Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S. 304;

Loomis v. Lehigh Valley Co., 240 U. S. 43.

The majority opinion of Judge Lewis thus holds that there is nothing in the contention that these Terminal Companies are not common carriers, and, therefore, violated the final decree of March 2, 1914, by filing tariffs and concurrences with the Commission and performing the transportation activities of common carriers.

> "I am unwilling to give to the sixth paragraph of the decree the construction and meaning attributed to it by Judges Carland and Stone, and thus hold respondents in contempt on account of their past co-operation with the Terminal Association in filing division sheets and thus sharing with it the tariffs on through shipments. That, it seems to me, is just what the sixth paragraph expressly permitted. Neither do I think the sixth paragraph can be held to be in conflict with and destructive

of other parts of the decree. I raise no question as to the facts found in the majority opinion but accept as true the statement 'The evidence and admissions of counsel show that the Terminal, in addition to doing a terminal business proper, and in addition to transporting as an accessory to their strictly terminal business traffic exclusively originating, moving and having destination upon the lines of the same, has at all times continued as before the entering of the final decree and still continues, to engage in the general railroad transportation business an an intermediate common carrier as an initial common carrier and as a delivering common carrier, and has made no changes whatever in its previous custom in that respect.' Notwithstanding this I do not think it follows as a conclusion of law, as stated by the majority, 'that the Terminal has acted in the premises in violation of the order and decree of this Court.' The point of divergence over the meaning of the sixth paragraph seems to me to be this, whether the 'mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines' was prohibited by the decree or whether the decree simply left that subject to the control of the Interstate Commerce Commission. I think the latter meaning should be given to it.

Furthermore, I cannot see the necessity of amending the sixth paragraph as proposed. The practice of through billing on a joint rate is open to both East Side and West Side lines, as I understand it. Such arrangements are at all times within the exclusive control and regulation of the Interstate Commerce Commission, with power to determine in the first instance whether they are just, equitable and fair to the participating carriers, to the shippers and to the public, and it is not shown that the exercise of that power granted to the Commission by Congress will lessen or interfere with terminal services and facilities to be extended alike to all and every East Side and

> West Side Line. Hence there is no reason in my judgment, for holding the respondents in contempt in that respect, or amending the decree so as to expressly prohibit that practice. It follows that the respondents are not in contempt in those respects." (Rec. 502-503.)

In fact, the insistence of the West Side Lines that these Terminal Companies are not common carriers and are not under the exclusive original jurisdiction of the Commission was settled by the Court in its opinion reported in 236 U. S. 194, wherein the Government had contended that the fifth paragraph of the opinion reported in 224 U. S. 383, required the East Side Lines to haul coal to St. Louis at the same rate as to East St. Louis from the nearby mines in Illinois, and had strenuously urged that the so-called arbitrary charge, which was the charge of these Terminal Companies for its trans-Mississippi service, had been expressly ordered abolished. The controversy then was between the Government and the East Side Lines over how the charges of these Terminal Companies should be paid. The controversy now is precisely over the same thing except in the first instance the public paid these charges, and in the present instance these charges are largely paid by the West Side Lines. It would be interesting and instructive if this Court would read the brief of the Government filed in this case on the second appeal, and this Court will note that the Government rested upon the proposition that these Terminal Companies were not common carriers, their rails were only extensions of those of the Proprietary Lines, and that a Federal Court had jurisdiction to control and direct how these Terminal charges should be paid.

Mr. Chief Justice White, in his opinion, settled then, and, as we trusted, forever, the law of this case, and

declared unequivocally that this Court had never intended to assume any power conferred by law upon the Interstate Commerce Commission, and that the Interstate Commerce Commission had exclusive control over the rates and charges of the Terminal Companies on all business passing over its lines.

Mr. Chief Justice White said:

> "The subject of the ninth assignment of errors, upon which the United States most relies, relates to the fifth clause in the mandate containing a direction for the 'abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.'
>
> As the Court below on this subject did nothing more than embody in its decree the provision of the mandate, the contention is that error was committed because the decree failed to expound the language of the mandate. Indeed in the argument it was insisted that to properly give effect to the mandate there should have been inserted in the decree an express provision absolutely controlling or regulating for the future charges which the Terminal Company might make. But to have given effect to this view would have caused the decree to be plainly repugnant to the provisions of the Act to Regulate Commerce and contrary to the exercise by the State authorities of their power over charges of the Terminal Company in so far as the jurisdiction of such authorities may have extended. The flagrant repugnancy to the Act to Regulate Commerce, which would have resulted if the decree as asked had been granted, will become more manifest when it is considered that the insistence was as pointed out by the Court below in its opinion, that there should have been a provision in substance so fixing and perpetuating for

the future rates on traffic coming into East St. Louis from the zone mentioned in the mandate as to compel the commodities transported to East St. Louis to be carried from there across the river to their point of destination in St. Louis without any transportation charge whatever,—a direction which it is apparent would have involved, if given, a disregard not only of all the regulations concerning rates established under the Act to Regulate Commerce, but also, it may be, the prohibitions of that Act concerning preference and discrimination. This condition is not escaped by the suggestion that such limitations if imposed would not have been in substance repugnant to the Act to Regulate Commerce since, as the rate from which the repugnancy would arise would only apply to business done by combination and as the combination would have to be dissolved because of the repugnancy, therefore the repugnancy would cease to exist from the very fact that it arose. But this argument only restates the contention concerning another aspect of the case which we have previously disposed of and serves to emphasize the view that it is impossible to conceive that the decision of this Court recognized the right of the Terminal Company to continue to exist provided certain features in its organization which were in conflict with the Anti-Trust Act were removed, and yet at the same time provided that when such features were removed the right to continue should be lost by the fact of its exercise. The particular expression of disapproval of the form of rate stated in the clause relied upon could only have been based upon one of two conceptions: First, the intention if such a charge was attempted to be exacted under the future operation of the company which was permitted, to lay down a rule forbidding such a charge in the future by the Terminal Company and thereby expressing an opinion upon and controlling a subject plainly beyond the primary sphere of the judicial power and exclu-

sively within the original cognizance of the Interstate Commerce Commission under the terms of the Act to Regulate Commerce; or second, as there was contention in the record as to whether such a form of rate was charged, and if it was, as to its legality, the expressions on that subject were used only to exclude all inference that the judicial recognition of the right of the Terminal Company to continue in business on compliance with exactions which were required carried with it an implication of approval also to continue to exact the rate in question if it was being exacted thus excluding all room for the contention that the provisions of the Act to Regulate Commerce were in any way interfered with. That the expressions relied upon did not have the first meaning and therefore solely had the second, so clearly results from the context of the mandate, that is, from its seventh paragraph, as to need no further consideration of the subject. The clause is as follows:

'Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon Such Commission.'

Comprehensively considering and once again weighing all the contentions pressed upon us by the United States, we are of the opinion they all in last analysis rest upon the following contradictory assumptions: (*a*) that the decision of this Court destroyed one set of public rights upon the theory of protecting another set; (*b*) that it proposed to correct an abuse of one statute by conferring authority to violate another; (*c*) that while exerting the authority of enforcing one statute the power was assumed of setting aside the provisions of an-

other statute. On the contrary, when the confusion upon which these views rest is disregarded. we are of the opinion that the decision involved none of these contrarieties or conflicts since in the public interest and to open wide the avenues of commerce and make them free to the enjoyment of all, it commanded the correction of conditions impeding that result and which were in conflict with the Anti-Trust Act, thus bringing the assailed combination under the law of the land and leaving it to be controlled by such law." (Rec. 92-94.)

When this matter was submitted to Circuit Judges Sanborn, Hook and Smith, Judge Hook filed a memorandum dissenting opinion, adopting the theory of the Government (Rec. 61-67), but Judge Smith, in a majority opinion, announced the following doctrine, which was adopted by this Court:

"The members of the Court have entertained and now entertain divergent views as to what the decree in this case should be notwithstanding the opinion of the Supreme Court, which is our guide and which all of us are cheerfully desirous of following according to its true intent.

The foregoing decree is in the nature of a compromise of these divergent views and as such I have signed it, but I could not do this without expressing my personal opinion briefly upon the subject.

The fixing of rates for the future is a legislative and not a judicial function.

There are numerous roads which do not extend beyond the State of Illinois which terminate at East St. Louis. One of these is only eight or ten miles long. It probably cost not to exceed three hundred thousand dollars for the entire road. It is now contended that the Supreme Court meant to hold that for whatever price this road saw fit to haul coal to East St. Louis or for whatever price might be fixed by Illinois, it must

haul it to St. Louis over property including bridges, right-of-way and trackage worth many millions of dollars.

I cannot reach that conclusion and chiefly because such a decree would be beyond the jurisdiction of this or any other human court even as a part of the jurisdiction of a court of equity to award complete relief. It is distinctly a legislative function and until Congress or the Interstate Commerce Commission shall so fix the rates no judicial tribunal has any power to so decree.

2. Not only has the Interstate Commerce Commission not so decreed, but it has long held that such an order should not be made.

Commercial Club of Omaha v. C. R. I. & P. Ry. Co., 6 Interstate Commerce Commission Rep. 647;

See other cases cited in Pierce's Digest of Decisions under Act to Regulate Commerce, 405-6-7." (Rec. 71.)

The dissenting opinion of Judge Stone is but an echo of the declarations of Judge Hook which this Court refused to accept. (Opinion of Judge Stone, Rec. 503-509.)

There is nothing involved in this present case but rates and divisions of rates as thus correctly stated by Vice-President Maxwell of the Wabash Railroad:

> "If the Eastern roads are forced to pay bridge toll, they would either have to shrink their revenues, which they cannot afford to do, or increase the rates, which is a matter for the Interstate Commerce Commission to decide. In fact the whole matter is simply one of a passing point for rates and matter of divisions covered by practice since 1877. Now, as the rates, divisions and revenues of the carriers under the Transportation Act are under the control of the Interstate Commerce Commission, the whole question is one that comes within the jurisdiction of that body." (Rec. 421.)

Had this point not been settled by the opinion of Mr. Chief Justice White, it certainly is now under the opinion of Mr. Justice Brandeis, in the New England Divisions Case, 261 U. S. 184, holding that the Transportation Act of 1920 conferred upon the Interstate Commerce Commission authority to make a division of through freight rates applicable to groups of carriers in large sections of territory, and the Interstate Commerce Commission has jurisdiction and authority to divide a through freight rate between several connecting carriers using a river as a divisional line for breaking the rates.

In this case Mr. Justice Brandeis said:

> "It is true that Article 12 of the Act of June 18, 1910, chap. 309, 36 Stat. at L. 539, 551, 552, Comp. Stat. Art. 8583, 4 Fed. Stat. Anno. 2d ed. p. 458, which first conferred upon the Commission authority to establish or adjust divisions, did not, in terms, confer upon the Commission power to act on its own initiative. The language of the Act seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates. The extent of the Commission's power was a subject of doubt; and Transportation Act 1920 undertook, by Art. 15 (6), to remove doubts which had arisen. But Congress had, also, the broader purpose explained above. This is indicated, among other things, by expressions used in dealing with joint rates. By new Art. 15 (6), p. 486, the Commission is directed to give due consideration, in determining divisions, to 'the importance to the public of the transportation services of such carriers'; just as, by new Art. 15 (3), p. 485, the Commission is authorized upon its own initiative, when 'desirable in the public interest,' to establish joint rates and 'the divisions of such rates'."

Since under the law and decisions of this Court these Terminal Companies are common carriers and must file tariffs and concurrences with the Interstate Commerce Commission, and the Interstate Commerce Commission has jurisdiction and authority over the joint through rates to be fixed by the Commission, and the Commission has authority to break a rate at the bank of a river and provide for a division of rates between Eastern and Western railroads, it is difficult to conceive how any logical, or even plausible, argument may be advanced that a Federal Court may now order these Terminal Companies and the East Side Lines to reconstruct their tariffs and concurrences on file with the Commission and to bring about changes in rate conditions which would be effective at other river crossings on the Mississippi River, and as a practical proposition it would be unjust and unfair to the trunk lines and coal carrying lines ending at East St. Louis and not parties to this suit for this Court to compel the East Side Lines to change their rates and thus coerce all other East Side railroads, Non-Proprietary Lines and not parties to this suit, to do the same thing.

The evidence clearly shows that if the East Side Lines are driven, through Court decree, to change the division of the rates at East St. Louis, the division of rates at other river crossings will be thereby affected.

(Maxwell, Rec. 420; Sudborough, Rec. 431.)

Clearly, if there be any justice in the contention of the West Side Lines, the Interstate Commerce Commission stands clothed with complete jurisdiction, power and authority to hear their complaints, provide a remedy and redress their wrongs.

We do not undertake to go into the merits of this controversy between the East Side Lines and the West

Side Lines. We are only concerned, as the impartial agents and servants of the Proprietary and the Non-Proprietary Lines, in giving efficient and satisfactory service, but somebody must pay us, and the Interstate Commerce Commission is the only forum where this matter can, or ought to be, decided.

The Joint Committee of the East Side Lines and the West Side Lines unanimously recommended that this matter be referred to the Interstate Commerce Commission.

(Sudborough, Rec. 438-439-441.)

Under the order of the Court requiring the East Side Lines to pay all Terminal charges on through westbound freight traffic there is no exception made to the considerable amount of through business upon which the Eastern carriers, before the division, have already paid the terminal charges out of the through rate, and as pointed out, there are two material exceptions to the general rule whereby the West Side Lines pay the charges of these Terminal Companies on westbound through freight traffic, which are:

Pacific Coast traffic originating east of the Mississippi River, and Central Freight Association traffic originating east of the Mississippi River destined for Texas.

(Maxwell, Rec. 416-418.)

The recommendation of the Joint Committee of the East Side Lines and the West Side Lines was not adopted, unfortunately, and, therefore, the peculiar and remarkable spectacle is presented of the East Side Lines and the West Side Lines, former allies and companions in arms, like the English and Germans at Waterloo, then friends, but now enemies, and we can only devoutly hope and pray that these Ter-

minal Companies will not be used, like unhappy Belgium, for a common battle ground.

It would be extremely unfortunate, too, if the innocent and unoffending by-standers, the East Side Non-Proprietary Lines, especially the coal carrying lines for which the Terminal, as a common carrier, transports the majority of coal used in the St. Louis industrial district, must have their revenues depleted and be driven, without having a hearing or day in Court, to pay the Terminal charges on all through westbound business with practically no through eastbound business from which their earnings could be partially balanced. All these observations merely emphasize how utterly impracticable and unjust it is for a Federal Court, without adequate or necessary machinery for rate making, to enter this vast complex and involved jurisdiction.

III

Under the Operating Agreements With the Proprietary Lines Which Have Been Sanctioned by This Court, These Terminal Companies Lawfully are Performing Terminal Services as the Impartial Agents of the Proprietary and Non-Proprietary Lines.

The Contract of October 1, 1889, provides that these Terminal Companies "should perform promptly and efficiently the work of receiving, delivering and transferring all passenger and freight traffic of the several Proprietary Companies at St. Louis and East St. Louis." (Rec. 156.)

The Supplemental Agreement of January 16, 1903, between these Terminal Companies and the Proprietary Lines, provides that "The Terminal Associa-

tion shall accept traffic offered to it at any junction, connection or incline, and shall handle and deliver the same with promptness and dispatch at the point of interchange designated by the delivering line. The tariff of the Terminal Association shall be so regulated that there shall be no difference in the rate on trans-river traffic by reason of the fact that such traffic is handled by bridge or ferry." (Rec. 164-165.)

These contracts were amended pursuant to the opinion of this Court in 224 U. S. 383 by the execution of the Re-Organization Agreement of September 21, 1914, between these Terminal Companies and the Proprietary Lines so that the above quoted provisions are still in effect and operative, and have been expressly approved by this Court in 236 U. S. 194, in the following language:

> "The contracts and agreements executed by the parties to remove the causes of illegality, and which were approved by the Court, were adequate for that purpose."

The legal status of these Terminal Companies as distinguished from trunk line railroads was determined by the Supreme Court of Missouri in 1904, in Quo Warranto proceedings, brought by the Honorable Edward C. Crow, Attorney General of Missouri, to annul the Charter of the Terminal Railroad Association on the ground that it violated the State law prohibiting railroad companies from consolidating with parallel or competing lines. The Supreme Court denied the writ and showed the difference between "corporations engaged in carrying over their railroad freight and passengers from one City to the other, and other corporations engaged in transferring the cars brought by a railroad to its terminus in a City

to some other point in the same city or to a common terminus of all railroad traffic in that city. The characters of the business of the two kinds of corporations were essentially different, though both related to railroad traffic. The one was railroad business in its ordinary meaning, the other railroad business of a special character." (State Ex. Inf. vs. Terminal Railroad Association, 182 Mo. 284, 296.)

Counsel for the appellants were apprehensive that the language in Section One of the decree of March 2nd, 1914, might prove susceptible of mischievous consequences in that these Terminal Companies were held to be an unlawful combination if operated as railroad transportation companies, and yet were permitted to exist "upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business." (Record 68.)

These appellants moved the Court to strike out this Section because it seemed to qualify them as an illegal combination although they ceased to be such when they had met the requirements of the decree. This Court held, however, that the proposition should not be regarded as in controversy since the criticism was unwarranted. Mr. Chief Justice White declared "in saying this we do not overlook a contention of the defendants with which the interveners are not concerned as to error committed in qualifying the defendants as an illegal combination. although, by complying with the requirements exacted by the decision of this Court, they were no longer subject to be so qualified. But we treat that subject as not in controversy because we are of the opinion that the contention concerning it rests upon a wholly unwarranted

criticism of a mere form of expression in the decree, unwarranted because on its face the decree unmistakably demonstrates the contention to be absolutely devoid of all merit." (236 U. S. 194.)

The West Side Lines have long argued that because these Terminal Companies were not railroads in the ordinary meaning they were not common carriers, and they have failed to appreciate that while these Terminal Companies were forbidden to carry on the transportation business of hauling freight and passengers from one city to another, they could, as common carriers, lawfully transfer "cars brought by a railroad to its terminus in a city to some other point in the same city or to a common terminus of all railroad traffic in that city," and that while the characters of the two kinds of corporations were essentially different "both related to railroad traffic." (State Ex. Inf. v. Terminal Company, *supra*, page 270.)

The Sections of the Interstate Commerce Act from which we have quoted at length unmistakably demonstrate that the operation of bridges, ferries and the tunnel by these Terminal Companies, and the transportation of the freight and passenger business of the trunk line railroads across the Mississippi River pursuant to their contracts and agreements with the Proprietary Lines is railroad transportation, and these Terminal Companies are unmistakably common carriers and amenable to the exclusive, initial jurisdiction of the Interstate Commerce Commission.

There was another portion of Section One of the final decree of March 2nd, 1914, which was misleading and was incorporated in the decree at the suggestion of the Government upon the theory that these

Terminal Companies were not common carriers and could only handle traffic for the railroads themselves as their operating agent, and could only exist as a lawful combination,

> "Upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads." (Record 68.)

This final decree was an attempted compromise between Circuit Judges Sanborn, Hook and Smith, and this Section One was an attempt on the part of Judge Hook to inject his views into the case which have proven a perfect Pandora's Box from which has emanated so much of economic loss in time and money. Judge Smith in discussing this final decree said:

> "The members of the Court have entertained and now entertain divergent views as to how the decree in this case should be notwithstanding the opinion of the Supreme Court, which is our guide and which all of us are cheerfully desirous of following according to its true intent.
>
> The foregoing decree is in the nature of a compromise of these divergent views and as such I have signed it, but I could not do this without expressing my personal opinion briefly upon the subject." (Record 71.)

These Terminal Companies were alarmed at this language of Section One in the decree and so were certain industries located on its lines and whose business was handled by these Terminal Companies as common carriers. Consequently these Terminal Companies moved to strike out this portion of the decree, and the industries intervened and made the same request, or at least that the

Court modify the decree so that unquestionably these Terminal Companies would not be limited in their activities as common carriers merely to the supplying and operating facilities for the interchange of traffic between railroads. The Government objected to any modification of the decree, and these appellants and the industries were unsuccessful in obtaining the elimination of this language. Upon appeal to this Court by all parties, the Government continued to contend that these Terminal Companies, under the decision in 224 U. S. 383, were properly condemned as common carriers and that they interposed themselves between the railroads ending on the East Side of the Mississippi River and on the West Side of the Mississippi River as general transportation companies and carriers, when under the law they were not common carriers, but were merely agents of the Proprietary Lines engaged in transportation.

Of course, the real purpose of the Government, as disclosed in the dissenting opinion of Judge Hook (Record 61-67), was to give the Government on appeal a further opportunity to insist that the final decree should specifically require the East Side Lines to haul coal to St. Louis at the same rate as to East St. Louis by enjoining them "from making any special or so-called arbitrary charge for the use of the Terminal facilities in respect of traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area." (Record 70.)

The case was briefed, argued and submitted to this Court upon the two divergent theories, the Government contending that this Court had decided, in 224

U. S. 383, these Terminal Companies were not common carriers, that their activities were limited to serving the trunk line railroads, that they could not even as common carriers handle the business of industries located on their lines, and that the arbitrary charge on coal originating within the so-called one hundred mile area had been abolished; on the other hand these appellants, including these West Side Lines as then represented by their Special Counsel, contended that the decision of this Court meant, and was intended to mean, that these Terminal Companies were common carriers, and, although not engaged in railroad business in its ordinary sense, yet their business was "related to railroad traffic" just as much, though in a different way, as a general trunk line railroad, and that this Court had not intended to restrict, directly or indirectly, the terminal business of these Companies, but had intended that they might not only serve the trunk line railroads, but industries and the general public as well, nor was the retention or elimination of the so-called arbitrary within the jurisdiction of this Court, but was wholly within the jurisdiction of the Interstate Commerce Commission.

Speaking through Mr. Chief Justice White, this Court fully sustained the contentions of the appellants and its intervening industries, ordered the decree to be modified so that beyond question these Terminal Companies could handle the business of its industries, exploded the theory that this Court had entered the domain of the Interstate Commerce Commission, and unequivocally held that thereafter the agreements and contracts had been modified as directed and the six enumerated requirements met so that these Terminal Companies would come under the law of the land and were purged of all offending.

Mr. Chief Justice White, in 236 U. S. 194, thus summed up and settled this proposition:

> "Comprehensively considering and once again weighing all the contentions pressed upon us by the United States, we are of the opinion they all in last analysis rest upon the following contradictory assumptions: (a) that the decision of this court destroyed one set of public rights upon the theory of protecting another set; (b) that it proposed to correct an abuse of one statute by conferring authority to violate another; (c) that while exerting the authority of enforcing one statute the power was assumed of setting aside the provisions of another statute. On the contrary, when the confusion upon which these views rest is disregarded we are of the opinion that the decision involved none of these contrarieties or conflicts since in the public interest and to open wide the avenues of commerce and make them free to the enjoyment of all, it commanded the correction of conditions impeding that result and which were in conflict with the Anti-Trust Act, thus bringing the assailed combination under the law of the land and leaving it to be controlled by such law." (Rec. 94.)

Every proposition involved in the case at bar has been passed upon and decided by this Court in 236 U. S. 194, and it is difficult now to reconcile the insistencies of the West Side Lines with the position they have heretofore occupied before this Court, in fact it is hard to understand how a Federal Court, which was held to be without jurisdiction to fix the division of a rate for the benefit of the public so as to eliminate the charges of these Terminal Companies on the commodities originating within the so-called one hundred mile area, yet can exercise jurisdiction to divide the rate for the benefit of the West Side Lines on all

westbound business originating East of the Mississippi River and passing through this gateway.

IV.

Since the Rates, Fares and Charges of These Terminal Companies, and the Division of Joint Rates, Fares or Charges, Now in Controversy, Were in Effect on February 29, 1920, They Must Continue in Effect Until Changed by Mutual Agreement Between the Interested Carriers or by State or Federal Authorities.

Section 208, Transportation Act, 1920, reads as follows:

> "(a) All rates, fares and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.
>
> (b) All divisions of joint rates, fares, or charges which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities respectively."

The present practices of dividing rates between the West and East Side Lines, and the absorption of the Terminal charges, have been in effect for over forty years. (Haile, Rec. 264.)

The present rates, fares, charges and divisions of joint rates, fares and charges prevailed on February 29, 1920, and, except with minor modifications by the Interstate Commerce Commission, were in effect at the time these appellants were held to be in contempt of the orders and decrees of this Court by Circuit Judges Sanborn and Lewis on February 8, 1923. (Rec. 509, et seq.)

In order to make this order of contempt effective it would be necessary to withdraw the tariffs and division sheets then on file with the Interstate Commerce Commission, but plainly, this cannot be required by a Federal Court unless Section 208 of the Transportation Act be unconstitutional and void.

This Court, in the New England Divisions Case, 261 U. S. 184, treated this Section as valid, and spoke of it approvingly as follows:

> "These agreements were in the form of express contracts. Section 208 (b) of the Transportation Act, 1920, provided that all divisions of joint rates in effect at the time of its passage should continue in force until thereafter changed either by mutual agreement between the interested carriers or by State or Federal authorities."

As this Court has held, in 236 U. S. 194, that the division of the rates affecting the Terminal Companies and the West and East Side Lines may not be changed except by a rate making body, and as they have not been so changed, the order now appealed from entered by the Circuit Judges on February 8, 1923, should

be declared by this Court as void and an attempt to control and interfere with the exclusive, initial jurisdiction of the Interstate Commerce Commission.

V

These Terminal Companies are Separate Corporate Entities, and Have Never Been Merged or Consolidated With Each Other or With the Proprietary Lines.

We miss in this case the genial, if pestiferous, personality of the Honorable Edward C. Crow, who in 1904 as Attorney General of Missouri, through Quo Warranto proceedings, endeavored to dissolve these Terminal Companies as parallel and competing lines. His real purpose was to force these Terminal Companies to be operated separately upon the theory that if placed on a competitive basis one or the other of them would haul coal from East St. Louis to St. Louis for nothing, and the others would have to do the same in order to meet the competition. The Supreme Court of Missouri, in the case of State, Inf. v. Terminal Railroad Association, *supra*, gave him a setback, but nothing daunted, he, acting pro bono publico, applied to Mr. Chief Justice Taft, then Secretary of War of the United States, for an order to show cause upon these Terminal Companies why the Secretary of War should not take possession of the Merchants Bridge because it was unlawfully consolidated with the Eads Bridge. After a full investigation, on June 5, 1905, Mr. Chief Justice Taft, as Secretary of War, rendered the following written opinion in which he held there had been no consolidation, and thus General Crow was turned down again:

"In the light of this rule of construction, the proposition 'consolidation' of two parties should be given its technical and legal significance. When the rights, franchises and properties of two or more corporations are by legal agreement combined into one whole, the stock of the two being fused in the stock of a third corporation, and their stockholders becoming stockholders of the third, the third corporation is a consolidation of the two constituent corporations. This may be done by a fusion of the stock and the issuing of stock of a third corporation, or by the merger of one corporation into another.

(Phila, etc. R. R. Co. vs. Howard, 13 How. U. S. 333.)

"Waterman says:

'Although it is difficult to give a precise and comprehensive definition of this term (consolidation), yet it may be stated generally that by it is intended the formation of a corporate body out of two or more corporations, or the union of the members of several similarly constituted companies in a single company, and an incorporation of the latter with the combined capital, rights, privileges and franchises of all of them. It has been said to be a dissolution of certain corporations, and at the same instant the creation of a new corporation, with property, liabilities and stockholders derived from those passing out of existence.'

(Waterman on Corp., Vol. 1, Sec. 152, p. 557.)

"In order to produce a consolidation it is unnecessary that there should be a third corporation formed out of the other two. It is sufficient if one of the two is merged into the other, so that there is dissolution of the one and a continuance of the other combining the two.

Meyer v. Johnston, 64 Ala. 603 (1879);

Tod v. Kentucky Land Co., 57 Fed. (1893), p. 56;

See also Black's Law Dict. title "Consolidation";
2 Clark & Marshall on Corporations, Sec. 347-348;
2 Elliott on Railroads, Sec. 335;
2 Morawetz, Sec. 939;
1 Rorer on Railroads, 588.

"The effect of consolidation ordinarily either works a dissolution of both corporations and the creation of a third corporation, or the dissolution of one of the two and the continuance of the second with the first dissolved and merged into the second.

Baulrued vs. George, 98 U. S. 363, and many other cases.

"It is noted that the laws of Missouri make provision for the consolidation of railroad companies which in effect fuses the stock of the old companies into the stock of the new consolidated company.

"It is very plain that there was no such consolidation of the two bridge companies in this case, as consolidation is above defined. In effect, what there was, was controlled by the Terminal Association of the Eads Brige through a lease, and the control by the same Association of the Merchants Bridge through holding a majority of the stock in the St. Louis Merchants Bridge Terminal Association, which owned all the stock of the Merchants Bridge."

But General Crow returned to the attack and, being employed as Special Counsel by the Government at the direction of the Attorney-General of the United States, brought this case, in 1905, under the Sherman Anti-Trust Act. As before and always, the real design, and the spring which moved him, was the abolition of the so-called arbitrary which was nothing more or less than the service

charge made by these Terminal Companies for hauling coal from East St. Louis to St. Louis and delivering it to industries in the St. Louis Switching District, comprising an area of approximately seventy-five square miles.

The opinion of the Court in 224 U. S. 383 gave him great comfort, for the fifth paragraph of the specific directions, according to his views, abolished this arbitrary since the coal to be handled by these Terminal Companies, and practically all the commercial coal used in the St. Louis Switching District, originates in the so-called one hundred-mile area. This fifth paragraph reads as follows:

> "By providing for the abolition of any special or so-called arbitrary charge for the use of the Terminal facilities in respect of traffic originating within the so-called one hundred-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area." (Rec. 49.)

However, Mr. Chief Justice White, in 236 U. S. 194, took occasion to explain that this Court had no intention of interfering with the division of any rate, or any rate to be charged by these Terminal Companies, and that this fifth paragraph had crept into the opinion "as there was contention in the record as to whether such a form of rate was charged, and if it was, as to its legality, the expressions on that subject were used only to exclude all inference that the judicial recognition of the right of the Terminal Company to continue in business on compliance with exactions which were required carried with it an implication of approval also to continue to exact the rate in question if it was being exacted, thus excluding all room for the

contention that the provisions of the Act to Regulate Commerce were in any way interfered with."

In the meanwhile, General Crow, as Special Counsel for the Pulitzer Publishing Company, the corporate name of the company which publishes the St. Louis Post-Dispatch, a powerful and influential evening paper at St. Louis, in conjunction with the Business Men's League of St. Louis, and some nearby coal companies in Illinois, desirous of getting their product hauled to St. Louis at the same rate as to East St. Louis, on February 13, 1914, complained to the Interstate Commerce Commission against the East Side Lines, these Terminal Companies and other Non-Proprietary coal carrying lines, contending that it was the duty of the Commission to give effect to the opinion of this Court in 224 U. S. 383 and order the East Side coal carrying lines to haul coal originating within the so-called one hundred mile area to St. Louis at the same rate as to East St. Louis.

The Commission did not wait for the decision of this case, afterwards reported in 236 U. S. 194, but on January 29, 1915, in the Illinois Coal Cases, 32 I. C. C. 659, dismissed the complaints and held that as a matter of fact the so-called arbitrary did not exist.

In discussing the opinion of this Court, 224 U. S. 383, the Commission said:

> "In the case last cited (ante p. 677) the Supreme Court of the United States reversed and remanded the cause with directions to the lower Court to enter a decree, among other things, providing for the complete abolition of the then existing practice of billing the traffic to East St. Louis and then rebilling to St. Louis (id. p. 411). The present practices of the carriers with respect to their coal traffic comply with this requirement and through billing to St. Louis is issued from all these Illinois

mines. The lower Court was directed also to embrace in its decree the following requirement:

> 'Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.'

"In the same connection the Court states that the arbitrary charge 'seems to have been also applied to the large coal traffic between the Illinois coal mines, upon which the city is largely dependent.' We do not understand from the record in the proceeding here before us that any of the defendant and respondent carriers at this time applies an arbitrary charge on coal moving to St. Louis from any mine in Illinois within the 100-mile area that is not also exacted on coal from Illinois mines outside that area; and nothing herein said is to be understood as authorizing any such practice. Counsel for the Illinois Central on his brief in this case definitely states that—

> 'It is to be remarked on behalf of the Illinois Central that, regardless of the origin of the coal, it makes no discrimination and no distinction between the coal originating within 100 miles of St. Louis and coal originating beyond that limit. It may be that there are in effect some rates over other lines in which this distinction is made, but if so it is asserted with some confidence that little or no coal moves into St. Louis on rates which make no distinction between East St. Louis and St. Louis.'

"This is in conformity with our own investigations; we understand that all coal moving to St. Louis from any of the 13 groups in Illinois, whether within or without the so-called 100-mile zone, takes rates that are 20 cents a ton higher than the

rates from the same mines to East St. Louis. But the Court also said in its opinion in that case (id. p. 412):

> 'To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company * * * or any other power conferred by law upon such Commission.'

"The lower Court subsequently entered a decree embodying the several requirements of the upper Court in practically the identical language used in its opinion. In a separate opinion accompanying the decree one of the three Judges by whom it was entered indicates that divergent views were entertained in the lower Court as to what the decree should be, 'notwithstanding the opinion of the Supreme Court'; and he refers to certain matters on which the doubt as to the meaning of the upper Court is based. The same doubt is expressed on the record before us here. But the case is again before the Supreme Court of the United States for interpretation, and we need not, therefore, attempt to put any construction of our own upon it. It will suffice to say that, as we understand it, the record does not disclose the existence at this time of any such rate adjustment with respect to coal moving to St. Louis from the 13 groups in question, as is described in the case cited. Moreover, such conclusions as we may now reach on the problems before us in this proceeding may subsequently be modified so as to conform to any further announcement in that case by the Supreme Court."

(32 I. C. C. Rep., 678-679.)

The Commission then held, speaking as a rate-making body, that St. Louis and East St. Louis were not

entitled to the same rates on coal from the mines in Illinois, and endeavored to forever settle the question in the following language:

> "With all these facts before us we are not prepared, on the general theory that the two communities are one from a commercial point of view, to hold that they also form one community for transportation and rate-making purposes. On long-haul traffic the charges of the Terminal Association disappear in the through rate through the absorption of them by the line carriers as heretofore stated, their larger revenues on such traffic enabling this to be done. But we see of record no just basis for requiring the absorption by the line carriers of the charges of the Terminal Association on their short-haul traffic yielding much lower revenues. Whether the Terminal Association be considered as a separate entity or its rails simply an extension of the rails of the Proprietary Lines, thus making a one-line haul in some cases from these mines into St. Louis, no suffiicient reasons are shown on this record for a finding that the St. Louis rate should not exceed the East St. Louis rate. Before dismissing this contention it is well to add that while the St. Louis interests earnestly pressed this view upon our consideration, the East St. Louis interests were also contending, no less vigorously, that that city is entitled to the natural advantage of its geographical location."
>
> (32 I. C. C. Rep., 680-681.)

Then came the decision of this Court in 236 U. S. 194, which upheld the decision of the Interstate Commerce Commission, and General Crow permanently passed from view and retired from the lists as the pro bono publico representative of the people, as the Special Representative of the St. Louis Post-Dispatch, as Special Counsel for the Government and as Attorney-General of Missouri. His long and continued efforts

to abolish the arbitrary had become a matter of history.

But there was another avatar of public interests waiting eagerly to take the position vacated by General Crow, and the Honorable Joseph W. Folk, as counsel for the St. Louis Chamber of Commerce, successor to the Business Men's League, being anxious to break a lance against the arbitrary, on April 10, 1919, submitted a complaint to the Interstate Commerce Commission against the Director General of Railroads, these Terminal Companies, the East Side Lines and the Non-Proprietary coal carrying lines, contending that now that the Government was operating the railroads, this being the period of Federal Control, and as the City of St. Louis had, at great expense, built a railroad bridge across the river at St. Louis, that the United States Railroad Administration, as the benevolent dispenser of the public funds, ought to give free transfer service across the Mississippi River to the users of coal in the St. Louis industrial district, and that these changed conditions had nullified the previous opinion of the Interstate Commerce Commission in the Illinois Coal Cases, *supra.*

The same old propositions were again advanced, and it was again urged upon the Commission that under the decision of this Court, 224 U. S. 383, these Terminal Companies were not common carriers, that they had no right to file tariffs or concur in joint tariffs filed with the Interstate Commerce Commission by the trunk line railroads, and that their rails were the extensions of the rails of the Proprietary Lines, and for rate-making purposes St. Louis and East St. Louis ought to be treated as a single industrial district.

Strange to say, the Government, which had heretofore made these same insistencies, now that the money had to come out of its coffers, reversed itself and defended upon the same grounds on which these appellants had always relied, and which had always been sustained.

The Interstate Commerce Commission, in 57 I. C. C. 639, 645, affirmed its previous decision and upheld the existing practices, rates and divisions of rates, saying:

> "Substantially the foregoing general situation was presented in the Illinois coal cases, 32 I. C. C., 659, decided January 29, 1915, where the propriety of this same differential of 20 cents a ton was upheld. Conditions have not essentially changed since then. Neither the subsequent increase in the rates to both St. Louis and East St. Louis, nor the direct operation of the railroads by the Federal Government has changed either the fact or the amount of this differential. Nor has the subsequent construction by the City of St. Louis of the new Municipal Bridge to connect that point with East St. Louis, stressed particularly and at great length by complainant, any material effect upon the present issue. Perhaps the only power that the Commission, in any event, would have in connection with the use of this bridge by the trunk lines would be to require them, on a reasonable and proper basis, to establish through routes and joint rates with some municipal or other railway which might in future be organized and constructed to operate over it. Certain cases relied on, some of them decided since the case just mentioned, will be referred to in detail later.
>
> "The real question to be decided in this case is whether the relationship is proper between the St. Louis and the East St. Louis rates, as through-rate units from the mines to final points of delivery, regardless of whether these rates should be viewed as the rates only of the carriers from the

mines to East St. Louis, which require delivery on the rails of the Terminal Association in St. Louis as a continuation of their line haul to a point in the St. Louis district, as defined by the complainant, or as the joint rates of the line carriers to East St. Louis and the Terminal Association as a connecting carrier. Therefore, even if, as contended by the complainant, this coal is to be viewed as passing in transit over the rails of only one railway system from mine to point of delivery in the St. Louis district, what are really the two determinative questions in the case would still remain for consideration, namely, the relative services rendered by the defendants on the St. Louis and the East St. Louis coal under the respective through rate units, and the sufficiency of the volume of the rate to East St. Louis, in view of the short haul, to require absorption, without unduly encroaching upon the defendants' line-haul revenues, of any additional cost of performing the St. Louis service." (57 I. C. C. Rep. 645-646.)

The West Side Lines filed in this record some pleadings in a suit brought in the Circuit Court of the City of St. Louis, Missouri, and some correspondence which had been prepared by one of the numerous special counsel of these Terminal Companies in support of their contention that there was little, if any, corporate distinction between these Terminal Companies and the Proprietary Lines. (Rec. 457-490.)

This Court need concern itself, however, but little with this kind of evidence since the Supreme Court of Missouri, on December 3, 1917, National Enameling & Stamping Co. v. Granite City & M. B. L. Co., 199 S. W. Rep. 238, held that these Terminal Companies were separate corporate entities and each had its own responsibilities, and that the rails of one were not the rails of another. So, too, the Supreme Court of Illinois, in the case of East St. Louis Connecting Railway v.

Jarvis, 92 Federal 735, had rendered a like decision, and this case was cited with approval by the Supreme Court of Missouri, which also cited with approval many other cases recognizing the same principles, as follows:

> "We have heretofore set out at length the prominent facts of this case relating to the above subject. The evidence discloses that each of the defendants are incorporated companies, that each has its own board of directors and officers, and that neither defendant undertakes to conduct or manage the business or affairs of the other. The mere holding of the stock by the Terminal Railroad Association of St. Louis and the St. Louis Merchants' Bridge Terminal Railway Company, heretofore mentioned, cannot, in this action for specific performance, be construed as giving the Granite City & Madison Belt Line Railroad Company any proprietary interest in the switch track of the Madison, Illinois & St. Louis Railway.
>
> State ex. inf. vs. Railroad, 237 Mo. 338, 141 S. W. 643;
>
> State ex inf. vs. Railroad, 241 Mo. loc. cit. 12, 13, 144 S. W. 863.

To same effect are the following authorities:

Thompson on Corporations (2nd Ed.) Vol. 5, p. 853, Secs. 6037, 6040, 6041;

Cook on Stock and Stockholders and Corporation Law (3d. Ed.) Vol. 1, Sec. 6, p. 8, also section 315, p. 424;

East St. Louis Connecting Ry. vs. Jarvis, 92 Fed. 735, 34 C. C. A. 639;

Richmond & I. Construction Co. vs. Richmond N., I. & B. R. Co. et al., 68 Fed. loc. cit. 108, 15 C. C. A. 289, 34 L. R. A. 625;

Stone vs. Cleveland, C., C. & St. L. Ry. Co., 202 N. Y. loc. cit. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770;

Interstate Commerce Com. vs. Stickney, 215

U.S. loc. cit. 108, 30 Sup. Ct. 66, 54 L. Ed. 112;
Pullman Palace Car Co. v. Mo. Pac. Ry. Co., 115 U. S. loc. cit. 587, 6 Sup. Ct. 194, 29 L. Ed. 499." (199 S W., p. 242.)

Since the Interstate Commerce Commission has twice approved the operating practices, tariffs and divisions of rates of the Proprietary Lines and of these Terminal Companies, since the Government accepted the standard rate of return determined during the test period by the tariffs of these Terminal Companies filed with the Interstate Commerce Commission as a basis for contracting with these Terminal Companies for the use of their properties during Federal Control (Rec. 292--293); since these Terminal Companies accepted the provisions of the guaranty period of the Transportation Act of 1920, and were treated by the Government as common carriers with capacity to contract, and to accept the Federal guaranty (Rec. 293, 352-414); since these Terminal Companies were authorized to so contract by the unanimous action of their stockholders and Board of Directors representing these West Side Lines, as well as the East Side Lines (Rec. 301-302), since the Government during Federal control adopted and followed the operating practices, rates and divisions of rates which have prevailed for over forty years (Rec. 350); since these West Side Lines have, through joint Special Counsel, presented a united front against the continued and protracted attacks of their opponents for many years, it does not now lie in the mouths of the West Side Lines to inconsistenly contend that these Terminal Companies are not common carriers and are not within the ex-

clusive, initial jurisdiction of the Interstate Commerce Commission, and are not separate and distinct corporations and each, according to the nature and purposes of its organization, efficiently discharging its terminal functions for the common weal.

VI

Neither the Law nor the Facts Justify the District Court in Holding, in the Order of February 8, 1923, these Terminal Companies Had Violated the Decree of March 2, 1914, in That the "Terminal Railroad Association Had Been Using Bills of Lading or Receipts Taking the Place of Bills of Lading Usable for Transportation of Through Freight from Points on Its Lines to Distant Points Beyond Its Lines, and Had Been Issuing Passes Usable by Passengers Riding on Passes or Tickets from Points on Its Lines to Distant Points Beyond Its Lines." (Rec. 511.)

The uncontradicted testimony of Traffic Manager Stith conclusively shows that the Terminal Railroad Association and its subsidiaries had never printed or issued a bill of lading and had but one authoritative and authorized document which was delivered to a shipper tendering traffic to be handled by it in conjunction with a trunk line railroad. This document was in the form of a dray ticket reproduced on Page 340 of the record. At Page 339 of the record Mr. Stith testified:

> "The Terminal Railroad Association and its subsidiaries have never had a form of bill of lading, but they have always had, and still have, a simple form of dray ticket, form No. 15, a copy of which I will file in due course. The employees

who are authorized to sign receipts for freight are receiving clerks at the freight station, 12th and Poplar streets, the number varying with the volume of business and sometimes reaching as high as ten; the yard clerks in the different districts on both sides of the river, there being some 40 separate places where such receipts are signed, and in some instances where, as in the case of the outlying Belt districts, the foreman of the switching crew is authorized to sign receipts for freight, carloads. There are approximately one hundred employees who perform the function of signing receipts for freight."

The West Side Lines introduced some printed uniform bills of lading in which the name of the Terminal Railroad Association and some of its subsidiaries had been inserted as a carrier (Rec. 450-451), and the West Side Lines showed by testimony of some witnesses that their companies, which were industries on the lines of these Terminal Companies, had printed, at their own instance and expense, certain receipts taking the place of bills of lading for the handling of shipments by these Terminal Companies in conjunction with the trunk line railroads; but the uncontradicted testimony of Mr. Stith on Page 452 of the record is that "The Terminal did not print the form used in this bill of lading and did not have anything to do with its issuance . . . I do not, of my own personal knowledge, know that these bills of lading were not filled in as they are by the Terminal's agent, but to so fill them in would be contrary to instructions."

However, is it not clear that the kind and character of bill of lading or receipt taking the place of a bill of lading is a matter entirely within the jurisdiction of the Interstate Commerce Com-

mission; and is it not immaterial what kind of bill of lading the Terminal Companies issue, if the activities of these Terminal Companies, and what they do, are the activities and doings of terminal companies as distinguished from the activities and doings of trunk line railroads?

Since 1889 the Terminal Railroad Association, and later the St. Louis Merchants' Bridge Terminal Railway Company, and later other terminal companies constituting all these Terminal Companies, have done nothing other than handle expeditiously and efficiently the terminal business of the Proprietary and the Non-Proprietary Lines. As long as these Terminal Companies are "engaged in transferring the cars brought by a railroad to its terminus in a city to some other point in the same city, or to a common terminus of all railroad traffic in that city," they are Terminal Companies as distinguished from "corporations engaged in carrying over their railroads freight and passengers from one city to another."

The kind of business transacted by a Terminal Company is one thing, the kind of business transacted by a railroad "in its ordinary meaning," is another thing, and "the characters of the business of the two kinds of corporations were essentially different, though both related to railroad traffic." (State Inf. v. Terminal Railroad Association, *supra,* 297.)

As long as these Terminal Companies do or continue to do as they have been doing they are but carrying out and fulfilling the contracts and agreements obligatory upon them and the Proprietary Lines. This Court has held, 224 U. S. 383, that as Terminal Companies they could combine and serve the trunk line carriers; this Court again held, 236 U. S. 194, that

these Terminal Companies were under the exclusive, initial jurisdiction of the Interstate Commerce Commission, which alone had power to fix and determine rates and divisions of rates on traffic passing over their lines. The Interstate Commerce Commission has twice, in 32 I. C. C. 659 and in 57 I. C. C. 639, approved and upheld the practices, tariffs and divisions of tariffs of these appellants; the State and the Federal Courts have recognized these Terminal Companies as common carriers and as separate corporate entities capable of contracting, suing and being sued as distinct from each other and from the Proprietary Lines. (National Enameling and Stamping Co. v. Granite City and M. B. L. Co., 199 S. W. 238; East St. Louis Connecting Railway v. Jarvis, 92 Fed. 735.)

Why then should the final decree of March 2, 1914, be addressed to these Terminal Companies or deal in any way with their methods of accepting shipments from the public, so long as they serve the public and the trunk line railroads as terminal companies and not as railroads in the general meaning of the term?

But these Terminal Companies were also found guilty of violating the decree of March 2, 1914, in that they issued passes usable in connection with the passenger business of the East Side Lines for traveling on and off the terminal properties.

The form of a Terminal pass was introduced in evidence by Mr. Haile, who testified:

> "The pass issued to me by the Terminal Railroad Association reads, 'Terminal Railroad Association of St. Louis, Pass, between all stations, until December 31, 1921.' It is endorsed on the back, 'Good over St. Louis Merchants Bridge Terminal Railway.' It will not be honored for trans-

portation on any train outside of the territorial limits of the Terminal Railroad Association. I could use it on a trip that began and ended on the rails of the Terminal, say, from St. Louis to East St. Louis. I don't know that all of the railroads require the production of this pass. On one trip I was asked for the pass and afterwards the conductor said he did not have to have it, but I don't remember what road it was. With that exception I have been required to show it." (Rec. 265.)

Forms of Terminal trip passes were also introduced in evidence. (Rec. 266-268.)

From the foregoing it appears that these Terminal Companies only issue passes usable by their employes and the employes of the Proprietary and Tenant Lines in the performance of their duties. Passes are only issued to employes of the Proprietary and Tenant Lines on request of the proper officers of those Lines, and in entire conformity with the rules of the Interstate Commerce Commission, and only to those entitled to free transportation under the law; hence it is clear that these Terminal Companies never issued a pass to a passenger having an interstate ticket, but only to those who were entitled to and held free transportation. The inspectors of the Interstate Commerce Commission have examined the pass records time and again, and found no occasion to criticise the issuance of passes by these Terminal Companies.

The record conclusively shows that the Proprietary Lines under the Operating Agreements had a right to use the rails of the Terminal Companies for their passenger business, and the Terminal Companies own and operate no passenger cars, except in some few instances they haul the employes of industries from

points on their lines to other points on their lines. (Rec. 73-74.)

That the Proprietary Lines honor Terminal passes is purely a matter of business necessity, and we can neither conceive nor understand how any order or decree of this Court could have been violated by the Proprietary Lines permitting passengers holding Terminal passes to ride in their passenger cars over the rails of the Terminal Companies, and to continue their journey if they had free transportation good on the Proprietary Lines beyond the Terminal rails.

From a pecuniary standpoint these Terminal Companies are not affected by this latest order of the District Court adjudging them violators of the final decree of March 2, 1914, but this matter touches their pride and they are humiliated and ashamed that after years of successfully battling with the Government, the press and the pro bono publico champions of the people, they have read in vain and have been unable to understand and comprehend the English language so that, although they have been advised from time to time by their Special and General Counsel that their practices and acts were lawful, still, all have been mistaken and now, although the Government makes no complaint that its orders and decrees have been ignored, yet at the insistence of the West Side Lines, their co-defendants and alleged co-conspirators, they must be cast in contempt, and must be branded as having failed, since March 2, 1914, to appreciate their duties and obligations so little as to have treated an order and decree of the United States District Court with contumacy and contempt.

These appellants beg to assure this Honorable Court

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILWAY COMPANY, WIGGINS FERRY COMPANY et al.,

Appellants,

v.

THE UNITED STATES OF AMERICA, MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.

No. 425.

REPLY BRIEF FOR APPELLANTS.

R. V. FLETCHER,
L. J. HACKNEY,
ALEX. P. HUMPHREY,
MORISON R. WAITE,
T. W. WHITE,
D. P. WILLIAMS,
T. M. PIERCE,
J. L. HOWELL,
Solicitors for Appellants.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 919.

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REPLY BRIEF FOR APPELLANTS.

Appellants have concluded to file a short joint reply brief in answer to the brief filed by Appellees, the West Side Lines. No effort will be made to discuss questions which have been considered in the original briefs. Much of the argument submitted by Appellees has been anticipated in the original briefs. However, there are some contentions advanced by Appellees that seem to justify a reply.

I.

Appeal Not Under Section 238 of the Judicial Code.

In the argument for Appellees, West Side Lines, there is found the curious contention that since a Justice of this Court allowed the appeal in this case with supersedeas, therefore the appeal was taken under Section 238 of the Judicial Code, and as a result the only question presented is whether the Court had jurisdiction as a Federal Court. It is obvious that the contention is without merit. Several reasons indicating the lack of merit in this contention may be suggested. In the first place, manifestly the appeal was not taken under Section 238 of the Judicial Code. The Expedition Act (Ch. 544, 32 Stat. 823), being an act to expedite the hearing and determination of equity suits arising under the Sherman Anti-Trust Act, provides:

> "That in every suit in equity pending or hereafter brought in any Circuit Court of United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

It will thus be seen that by express provision of the statute an appeal from the decree in the instant

case could have been taken to no other Court than the Supreme Court. Section 238 of the Judicial Code deals with those cases which may be taken by direct appeal from the District Court to the Supreme Court. No mention is there made of equity cases arising under the Sherman Anti-Trust Act. The special provision in the statute we have quoted is independent of and in addition to the appeals provided by Section 238. Appellees contend that because Rule 36 of this Court provides that an appeal under Section 238 may be allowed by a Justice of the Supreme Court, every appeal which a Justice of this Court allows must therefore be taken under Section 238. Of course, this does not follow. There is nothing in the record to show that the application was made under Rule 36.

There can be no doubt but that a Justice of this Court has authority to grant an appeal with or without supersedeas in any case where the statutes permit an appeal direct from the District Court to this Court. Section 999, R. S. provides:

> "When the writ is issued by the Supreme Court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days notice."

It is true that the writ mentioned in this statute

means a writ of error, but Section 1012, R. S., provides:

> "Appeals from the circuit courts and district courts acting as circuit courts * * * shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error."

By virtue of this statute Section 999, R. S. applies to appeals as well as writs of error. Section 999 and the authority thereby conferred upon a Justice of this Court are considered in the case of

Sage v. Railroad Company, 96 U. S. 712-715,

where it is said:

> "Whoever can sign a citation may allow an appeal; and by Section 999, R. S., it is provided that this may be done by a judge of the Circuit Court or a justice of this court. The power is not confined to the justice assigned to the particular circuit in which the court that rendered the decree is held. When, therefore, Mr. Justice Hunt accepted the security in this case, he allowed an appeal, which, by reason of the form of the security, was to operate as a supersedeas."

It will be noted that this case was an equity case and could be reviewed, therefore, only by appeal.

The question of the authority of a Justice of this Court was again presented in

Hudson v. Parker, 156 U. S. 277.

The statutes on the subject are carefully reviewed in this opinion and it was held that any Justice of this Court may in or out of Court allow a writ of error, sign the citation, approve the surety offered or grant a supersedeas. These statutes and decisions make it clear that the authority of a Justice of this Court to allow an appeal does not in any way depend upon Rule 36 or any other rule promulgated by this Court. An appeal may be allowed by a Justice of this Court in any case where under this statute an appeal lies to this Court. All the decisions cited in the brief of appellees upon this point are cases which deal with appeals taken under Section 238 of the Judicial Code. Such a case is

Wilson v. Republic Iron & Steel Co. et al., 257 U. S. 92.

It was held in that case the Circuit Court of Appeals had power to review all features of the case, and a writ of error was prosecuted direct to the Supreme Court of the United States, which writ, of course, could be sued out only under Section 238 of the Judicial Code. The only question presented to this

Court was the jurisdiction of the Federal Court as such. This case furnishes no authority for the contention that because appellants here applied to a Justice of this Court for an appeal they thereby elected to appeal under Section 238 of the Judicial Code. No such election is involved since the appeal was taken under the provisions of the Sherman Anti-Trust Act, which we have referred to, allowing an appeal direct to this Court from every final decree rendered in an equity suit under this act.

Again, the Court will observe that Appellants applied to the District Court and were allowed an appeal by that Court. At page 514 of the Record will be found a petition for appeal addressed to the Circuit Judges of the United States for the Eighth Judicial Circuit sitting as a District Court. Attached to this petition is an assignment of errors. On page 522 et seq. of the Record will be found an order entered by the Circuit Judges holding the District Court allowing this appeal with supersedeas. It is obvious, therefore, that if no application had been made to a Justice of this Court appellants would be properly here with their appeal, which has been duly allowed by the Circuit Judges. It should be explained that after the appeal was allowed by the Circuit Judges application was made to a Justice of this Court for an appeal with supersedeas for the reason that the order of the District Court allowing the supersedeas

was not as compiete as appellants desired. There was no difficulty about the appeal, but the order of the District Court did not permit so much of the decree as applied for the future to be superseded. Under that decree appellants were required to begin almost immediately to pay the charges of the Terminal Association and the application was made to a Justice of this Court in order to secure a more satisfactory supersedeas.

In the second place, Mr. Chief Justice White, in an opinion delivered in this case, U. S. v. Terminal Railroad Association et al., 236 U. S. 194, expressly held that every controversy arising out of the execution of the mandate was open to review either by original proceedings or in any other appropriate form:

> "The duty of the court below was but to execute the mandate of this Court, and every controversy between the parties concerning the discharge by the court below of its duty was open for this Court to examine, either originally, if essential, or as the result of an appeal by one of the parties, or by way of assertions of right made by the other party as an appellee even in the absence of a cross-appeal—a result inevitably arising from the fact that both parties, so far as the settlement of the decree of this Court was concerned, were in this court and endowed with the capacity to invoke its action for the proper

shaping and execution of the decree, either by original proceeding or in any other appropriate form (Perkins v. Fourniquet, 14 How. 328; Re Sanford Fork & Tool Co., 160 U. S. 247; In re Potts, 166 U. S. 263)" (Rec. 88).

Since the District Court has undertaken to punish these appellants for the violation of a decree entered pursuant to a mandate, and this controversy arises directly over the mandate and the decree, beyond any shadow of a doubt this Court has the right to hear now, or hereafter, any matter which may arise concerning the mandate or decree.

The point urged by appellees that the only question which the Court can consider upon this appeal is the jurisdiction of the lower court as a federal court is manifestly without merit. As stated by Appellees on page 13 of their brief, the issue to be decided by the lower Court and to be decided by this Court is: Were appellants in contempt of the decree of the District Court, and if so, was the proper punishment meted out?

II.

Alleged Violation of Decree.

Throughout the brief filed by appellees it is assumed that the East Side Lines have violated the decree of the District Court. That this had been done

was the finding of the court below. But no one has ever pointed out anything in the decree which had the slightest bearing upon the question of who should pay the transfer charges for moving freight from one side of the Mississippi River to the other. The decree alleged to be violated is found at pages 103 et seq. of the Record. Not a word is there contained bearing on the question of these charges. It is nowhere either directly or inferentially even suggested that it is the duty of the East Side Lines to pay the charges of the Terminal Association in either direction. In assuming that the decree has been violated by the East Side Lines and by the Terminal Association with respect to these charges, appellees constantly beg the question. That question is as to whether the court below was justified in saying that the decree finally entered in the original case was violated by the East Side Lines because they declined to pay the charges of the Terminal Association on traffic moving through the East St. Louis-St. Louis gateway. At the outset it may be as well to state that it is conceded in the brief of appellees that paragraph 3 of the final decree, that being the paragraph which prohibited rebilling at East St. Louis, is entirely out of the case. As stated by appellees at page 12 of their brief:

> "The East Side Lines, however, agree at page 7 of their Brief, with the West Side Lines, that

there is no question on this appeal based on this practice of rebilling."

If the decree be examined paragraph by paragraph it will be found that the first paragraph is the only one which can, by any possible construction, be considered as having any bearing on the case. It is there recited that the Terminal Association is an unlawful combination as long as it is operated as a railroad transportation company. It is further stated that it may continue to operate as a lawful unification of terminal facilities provided it will abandon all operating methods and charges as and for railroad transportation, and as long as it confines itself to the doing of a terminal business such as supplying and operating facilities for the interchange of traffic, etc. (Rec., 104). The defendants are enjoined from continuing the combination otherwise than as terminal facilities for the railroad companies. We assert that there is nothing in this language which gave the Court below the slightest authority for holding that the East Side Lines had violated the decree because they declined to pay the charges of the Terminal Association for handling through traffic in interchange. The Court below held that the Terminal Association then was not violating the terms of the decree, in that it published tariffs and participated in through rates and divisions. In the original

decree there is no suggestion that the Terminal Association may not continue to do business as a separate corporate entity. The restriction is upon the character of the business which it does. It must not do business as a railroad company in the ordinary meaning except such business as originates and terminates on its own rails. How can it be said that the decree against continuing to do a transportation business is violated because the East Side Lines, in accordance with their tariffs and division sheets, declined to pay charges which the West Side Lines have always paid under their agreements and contracts with the East Side Lines? What has the payment of these charges to do with the question of whether the Terminal Association is doing a transportation business or a terminal business? The decree says that the Terminal Association can lawfully continue only as a unification of terminal facilities and that it must abandon all operating methods in general use by railroad transportation companies. In other words, it must limit itself to a switching and terminal business.

But its charges must be paid; it must continue to receive support by the railroads that employ these facilities. The question of who shall pay the Terminal Association for these services is in no way involved in the question of whether the services performed and the operating methods used are incon-

sistent with the status of the Terminal Association as a switching line. The contention seems to be that because the West Side Lines pay the charges in both directions the Terminal Association is doing a transportation business. The contention seems to be further that if the East Side Lines and West Side Lines divide these charges, then the effect of so doing would be to transform the Terminal Association from a company doing a transportation business into a company doing a strictly terminal business. Such a contention is manifestly unsound.

It is said, however, that there is some obligation on the part of the Terminal Association to act as the impartial agent of all the lines which use its facilities. Assuming that the Terminal Association must maintain this impartial attitude, and conceding for the purpose of the argument that it is a duty enjoined by the decree upon the Terminal Association, in what way has it been shown that the Terminal Association has acted impartially? The Terminal Association does nothing but move freight from one railroad to another. It is unconcerned whether its charges are paid by the East Side Lines or by the West Side Lines. It has nothing to do with that phase of the matter. Whether the charges shall be paid by the lines on the east or the lines on the west is a matter to be settled between those lines.

There is nothing in this record to show that the Terminal Association has taken any part in this controversy. Appellees assert in their brief that the appeal of the West Side Lines to the Terminal Association for fair treatment has been ignored. The record, however, does not bear out this assertion. It is true that letters were addressed to the Terminal Association by the West Side Lines making certain demands, but the Terminal Association properly took the position that these were demands with which it had nothing to do. The Terminal Association disposed of these communications by saying that so far as it could ascertain from the advice of its counsel it was obeying the decree.

It is said that the Terminal Association has not been acting as the impartial agent of all lines because it would not accept traffic from the West Side Lines without prepayment of charges or a promise on the part of the West Side Lines to pay charges. The record shows, however, that the Terminal Association did not take this position until after the East Side Lines had refused to receive traffic delivered by the West Side Lines. Obviously the Terminal Association could not go on receiving freight from the West Side Lines which the East Side Lines had declined to accept. Such action would have resulted in congestion on the line of the Terminal Association without any way settling the controversy.

If it be said, however, that the Terminal Association is dominated by the East Side Lines, due to the preponderance of east side directors on its Board, it is difficult to see how the refusal of the East Side Lines to pay the transfer expense is a violation of any injunction found either in the decree or in previous decisions of the Court relating to impartial treatment. It will certainly not be contended that the Court in contempt proceedings can for all future time settle every dispute that may arise between the railroads serving the St. Louis-East St. Louis district, whatever may be the nature of this dispute, on the theory that the decree requires impartial treatment. The decree cannot be extended so as to make it a vehicle or medium through which all future disputes between railroads are to be adjusted.

III.

The Breaking Point of a Rate Is a Rate Question.

Here is a controversy between the East Side Lines and the West Side Lines about where the rates shall break. The Court below by reason of some theory that impartial treatment should be accorded to all lines by the Terminal Association proceeded to settle this dispute. It was a dispute as to where the rates should break and how the tariffs should be constructed. It was contended by the East Side Lines that the rates were so constructed as to make it

equitable for rates to break at East St. Louis, and they further contended that in the apportionment of revenue to such lines, consideration has always been given to the fact that East St. Louis was the breaking point of the rates and the point of interchange of the traffic, and that the West Side Lines were compensated for absorbing the charges of the Terminal Association through the division of the through rates which were given to the West Side Lines. The West Side Lines, however, contend that in fairness the charges of the Terminal Association should be divided. Without at this time going into the question of who is right about it, it is manifest that this dispute is one for the Interstate Commerce Commission, under provisions of the law to which we have called attention in our original briefs. The Court below, however, seems to take it for granted that the mandate as to impartial treatment required a decision that the East Side Lines should pay one-half of these charges. Any other controversy which may be suggested could just as well have been decided by the Court upon this theory. If a decree of this kind is to be upheld, no controversy can be imagined as between the parties to the original decree which cannot be settled by reference to this decree and that, too, through the medium of contempt proceedings.

IV.

The Terminal Association Has Been Impartial.

It is said that the Terminal Association must be impartial. Let that be granted for the sake of the argument. How has it ever been shown here to have acted not impartially? It is said its failure to act impartial is shown because it required the West Side Lines to pay the transfer charges in both directions. The question then inevitably arises as to whether it was proper for the West Side Lines to pay the charges in both directions. To settle this question the Court must look to the geographical situation, to the history of the rate structure, to the service which is performed by each of the parties and to all those considerations which only the Interstate Commerce Commission can initially consider in fixing divisions. Therefore, when the District Court held that the West Side Lines had not been fairly treated, it invaded the province of the Commission.

V.

The Terminal Association Has Not Been Guilty of Unlawful Practices.

It is said throughout the brief of the appellees that the Terminal Association was required by the

original decree to abandon unlawful administrative and operating practices. But nowhere is it pointed out in the brief as to just what unlawful practices the Terminal Railroad Association has continued. There is a lack of particularity in statement when reference is made to these unlawful administrative practices. What are they? Just what has the Terminal Association done at any time which is prohibited by the decree? It disclaims having willfully or knowingly issued bills of lading or passes and it does not particularly object, except upon ethical grounds, to the decree of the lower Court with respect to these alleged practices. But we ask this Court to search the record and find any single administrative practice of the Terminal Association relating to this question of payment which is prohibited by the original decree either expressly or by implication. The Terminal Association simply handled the freight which was handed to it and collected the charges according to arrangements made with the railroads for whom the service was performed, pursuant to tariffs and concurrences on file with the Commission.

Let us assume that there is a movement of through traffic from Buffalo, New York, to Denver, Colorado, by way of East St. Louis and St. Louis. According to division sheets and tariffs now in effect, some East Side Line takes the traffic to East St. Louis for a

certain proportion of the rate. One of the West Side Lines transports the traffic from East St. Louis to destination for the balance of the rate. The decree from which we appeal in effect provides that the East Side Lines shall take this traffic to St. Louis and there deliver it to the West Side Lines so that the expense of taking the traffic across the river will be borne by the East Side Lines. And the decree holds further that because the East Side Lines have not been doing this for some time they have violated a decree which did not deal with this question at all and which no one could possibly suspect had any relation to this question. Plainly a controversy between the East Side Lines and the West Side Lines on this subject is a question of divisions, a question of the absorption of switching charges; questions which are admittedly within the exclusive domain of the Interstate Commerce Commission.

VI.

The West and East Side Lines Have Agreed Where the Rate Shall Break.

Appellees say in their brief that the Court below did not undertake to fix rates or divisions—that it only asserted its authority to prohibit the East Side Lines from requiring the West Side Lines to pay more than their share of the expense. But the ques-

tion is, what is that share? Upon what considerations is that share to be fixed? It would not be asserted we assume that the East Side Lines and West Side Lines are prohibited by the decree from entering into an agreement if they saw proper that the West Side Lines should bear all the expense in both directions. In reality that is what the present situation amounts to. As pointed out in our original briefs, the history of the controversy shows that the West Side Lines in order to meet the competition of the Chicago & Alton Railroad voluntarily agreed to pay terminal charges in both directions. This arrangement was in effect at the time the original suit was brought and at the time the original decree was entered and was never mentioned by anybody. It was a matter of no concern to the public as to who paid these charges. It was a matter of arrangement among railroads. These arrangements vary in different cities according to circumstances which prevail in such cities. It is safe to say that in Chicago in some cases the charges are paid in both directions by one line and in other cases they are divided according to agreements made among the railroads. These terminal associations are found in many large cities. Can it be said that the Sherman Anti-Trust Law is violated in every case where the carriers do not divide the expense equally? Competition and other reasons cause a variation in the practice, and, in fact, competition at St. Louis is

responsible for the agreement of the West Side Lines to bear the transfer charges in both directions. If conditions have now changed so as to make such an agreement no longer equitable, the Interstate Commerce Commission exists to make such orders as are appropriate. We assert with confidence that the terms of the decree have never been disobeyed; that the Terminal Railroad Association has never acted unfairly or impartially and that the District Court has undertaken to decide a controversy here over which the Interstate Commerce Commission only has jurisdiction.

VII.

Railroads Not Parties to This Suit Will Be Affected by This Decree.

The result of the District Court's order in this case and the confusion which results therefrom can probably best be understood by considering the effect of this decree so far as it relates to nonproprietary lines, using the facilities of the Terminal, but not parties to the suit. The record shows that a number of railroads, like the Mobile & Ohio; Chicago Peoria & St. Louis; Toledo, St. Louis & Western and others enter East St. Louis from the East. They are East Side Lines. They are in competition with other East

Side Lines on traffic from many sections of the country. The Mobile & Ohio is in sharp competition with the Illinois Central for traffic originating south of the Ohio River. By reason of the fact that the Illinois Central is a Proprietary Line, while the Mobile & Ohio is not, the Illinois Central is required by the terms of the decree to pay the transfer charges on westbound traffic moving through St. Louis, while the Mobile & Ohio is not so required, not being a party to the proceeding. If the decree be affirmed we will therefore have a situation in which one railroad is required to bear the transfer charges in one direction and another railroad is not, although circumstances and conditions are precisely the same. Yet both railroads are interested in the same situation, both use the terminal facilities on precisely the same terms and no possible reason can be given why one should be treated differently from the other. If it is unfair for the West Side Lines to pay the charges on traffic delivered to them by the Illinois Central, it is just as unfair for them to pay the charges on the traffic delivered by the Mobile & Ohio. This situation illustrates how impossible it is for a Court administering the Sherman Anti-Trust Act to settle these questions of charges, rates and divisions, as the court below has undertaken to do.

VIII.

Contention as to the Character of the Facilities of the Terminal Association.

Appellees, in their brief, say that the effect of the decree is to make the rails of the Terminal Association extensions of the rails of the Proprietary Lines. Such cannot be the effect of the decision, since the final decree recognizes the right of the Terminal Association to continue as a separate corporate entity. But even if such be the effect of the decision, appellees do not in any way improve their position, for it must be remembered that the West Side Lines are also proprietors of the Terminal Association. All four of the appellees are equal owners in the Terminal Association. If the effect of the decree is to extend the rails of the East Side Lines westward, as far as the terminal rails extend, by the same token, the rails of the West Side Lines are extended eastward as far as the terminal rails extend in that direction. Upon this theory the East Side Lines are in St. Louis, but upon the same theory the West Side Lines are in East St. Louis.

If it be said that it is the duty of the East Side Lines to carry the traffic as far as their rails extend, it may be said with equal force and logic that it is the duty of the West Side Lines to carry the traffic

as far as their lines extend and receive the traffic at the point where their rails extended join the rails of the East Side Lines. Traffic moving from east to west through St. Louis, if the theory just mentioned be sound, is on the rails of the West Side Lines when it reaches East St. Louis, where the lines of the Eastern carriers end. We have a case, therefore, where there is a point of interchange both at East St. Louis and at St. Louis, and the question involved is: Where is the reasonable point of interchange? Plainly, this is a question for the Commission. If we assume that the Terminal Association is dissolved and all its property and facilities become the property of the Proprietary Lines as tenants in common, the question which the lower Court assumed to decide would not be in any way simplified. East St. Louis would still be a point on the rails of the West Side Lines because their ownership extends to East St. Louis. The East Side Lines and the West Side Lines would still have to settle the question as to whether the traffic should be interchanged at the one place on the lines of both or at the other place on the lines of both. Such a controversy could be settled only by considering elements with which the Interstate Commerce Commission, as an expert body, is alone qualified to deal.

IX.

The Terminal Association Must Act as It Does or Violate the Law.

The West Side Lines and the East Side Lines file tariffs with the Interstate Commerce Commission, and the Terminal Association concurs in these tariffs. The order of the District Court now in dispute requires the East Side Lines to pay back to the West Side Lines the terminal charges which have accrued under these tariffs and concurrences since March 2, 1914, and in the future to pay the terminal charges on through westbound business to the West Side Lines. The Terminal Association has only accepted payments as provided in these tariffs on file with the Interstate Commerce Commission. Without violating the law no different payments could have been made.

U. S. v. Union Stock Yards Company et al., 226 U. S. 286;
St. Louis Chamber of Commerce v. B. & O. R. R. Co. et al., 57 I. C. C. 639.

The only way the Terminal Association and the East Side Lines can comply with the order of the District Court requiring them to make payments will be to change their tariffs and concurrences on file with the Interstate Commerce Commission. To comply with this order will destroy the rate structure

now existing at this gateway, and all the Non-Proprietary East Side Lines will be coerced into filing new tariffs with the Interstate Commerce Commission. While the order of the District Court does not in terms direct the filing of these tariffs, yet this order cannot be obeyed without such tariffs being filed. In this situation the conclusion cannot be escaped but that a question of tariffs is involved in this controversy, and the jurisdiction of the Interstate Commerce Commission has been invaded.

X.

The Activities of Terminal Association Are Subject to the Exclusive Control of the Interstate Commerce Commission Under the Transportation Act of 1920.

The Appellees argue that the Transportation Act of 1920 does not apply to the regulation and control of the Terminal Association, since they say that they and the East Side Lines have agreed upon the use of the terminal properties, and the appellees seem to contend that the Interstate Commerce Commission would only have jurisdiction over this terminal situation in the event of a disagreement. (Brief for appellees, p. 22.)

In the light of the controversy that is now raging both over the use of the terminal properties as well

as the payment for such use, we are utterly at a loss to understand how the appellees conceive that no such disagreement exists at present between themselves and the East Side Lines.

The Terminal Association insisted in its brief, and again reiterates, that the Transportation Act of 1920 vested exclusive jurisdiction in the Interstate Commerce Commission to control the relations between these Terminal Companies and all the user lines, whether Proprietary or Nonproprietary, and that if the West Side Lines are not satisfied with the present method and practice under which the terminal charges are imposed, then their remedy lies before the Interstate Commerce Commission and cannot be invoked as growing out of the violation of any Court decree.

We further contended, and still contend, that this Court has no jurisdiction to disturb rate conditions which have existed here since 1877, and the destruction of which would not only profoundly disturb the revenues of other eastern carriers at this gateway not parties to these proceedings, but would affect the rate structures now in effect at other crossings of the Mississippi River.

It seems to us too clear for much argument that this action is but an effort on the part of the West Side Lines to obtain by indirection and through an order of Court a change in a matter which is originally and

exclusively within the power and authority of the Interstate Commerce Commission.

It is difficult to understand why the West Side Lines, if they feel themselves unfairly treated, have not taken this controversy to the Interstate Commerce Commission, where their right to relief is perfectly clear, provided their cause be just.

There are other contentions in the brief of the appellees with which we do not agree, but these have been anticipated and we think answered in our original brief.

Respectfully submitted,

R. V. FLETCHER,
L. J. HACKNEY,
ALEX P. HUMPHREY,
MORISON R. WAITE,
T. W. WHITE,
D. P. WILLIAMS,
T. M. PIERCE,
J. L. HOWELL,
Solicitors for Appellants.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILROAD COMPANY, WIGGINS FERRY COMPANY et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY et al.

No. 425.

Appeal from the District Court of the United States for the Eastern District of Missouri.

STATEMENT, BRIEF AND ARGUMENT OF JOHN F. LEE AND GEORGE M. BLOCK, AMICI CURIAE.

(NO. 29,735.)

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(NO. 29,735.)

STATEMENT.

The Evens & Howard Fire Brick Company, hereinafter called Brick Company, has a large plant for the

manufacture of brick and other kindred products, located on the line of the Terminal Railroad Association, in the City of St. Louis. Five (5) miles distant on the line of said Terminal Association the Brick Company owns and operates clay banks from which it obtains its entire supply of clay with which to operate its plant. The Terminal Association moves all of the clay from said mine to said manufacturing plant, and this business amounts to more than two thousand (2,000) loaded cars a year. This movement is entirely over the lines of the Terminal Association, but is not competitive with any railroad constituting one of the proprietary lines of said association or with any other railroad, and is entirely intrastate business, and without the movement of this freight by the Terminal Association the Brick Company must necessarily close down its plant and be subjected to irreparable loss. (See Rec., p. 74.)

The Missouri Portland Cement Company (formerly the Union Sand and Material Company, its name having been changed but its legal identity being the same, and hereinafter called the Cement Company) has its elevator plant at the foot of Tyler street for the elevating of sand from the Mississippi River, in the City of St. Louis, located on line of the Terminal Association. At this plant all of the sand which it produces for the use of the City of St. Louis and surrounding territory is elevated and loaded into cars,

and it has erected and constructed an elevator plant at this point at a large cost to it, and it owns and uses a large number of cars in moving and delivering its sand from this plant. It has various yards located on the Terminal Association for supplying sand in the City of St. Louis, and it also supplies a large amount of sand to various industrial plants and factories located on the tracks of the Terminal Association. For the Cement Company the Terminal Association now moves from Tyler street to the various yards of the Cement Company and to said industrial plants many thousand loaded cars a year. This movement is entirely over the lines of the Terminal Association, but is not competitive with any other railroad constituting one of the proprietary lines in said association or with any other railroad, and is entirely intrastate business, and without this movement of the product of the Cement Company by the Terminal Association from the Tyler street plant to the other yards and industrial concerns above set out it would be impossible for the Cement Company to supply its sand to various points in the City of St. Louis, as to move its said product in any other way than by loaded cars moved over rails would make the cost prohibitive. (See Rec., p. 78.)

There were joined with the Brick Company and Cement Company in the original interventions fifty-three other parties similarly situated on the Terminal

Railroad Association, the movement of whose freight exclusively over the Terminal aggregated many thousand loaded cars a year.

The case of the United States of America v. Terminal Railroad Association et al. was a suit originally brought in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, under the Anti-Trust Acts of the United States, the purpose being to have the Terminal Railroad Association declared an illegal combination in restraint of trade, and to have it enjoined from further continuing to operate in contravention of the Anti-Trust Acts of the United States. In March, 1914, a decree was entered in the District Court declaring the Terminal Association to be a trust and an illegal combination, but, providing, because of peculiar conditions existing, that it might continue to operate as a unification of terminal facilities, but subject to certain conditions. Section 1, on page 2, of said decree reads as follows:

> "The defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents, **otherwise than as terminal facilities for the railroad companies using the same.**"

Said section 2 of said decree further provided that the Terminal Association may continue as a lawful unification of terminal facilities

> "**upon abandoning all operating methods and charges as and for railroad transportation** and confining itself to the transaction of a terminal business, **such as supplying and operating facilities for the interchange of traffic between railroads.**"

This case was appealed to the Supreme Court of the United States, both by the plaintiff and the defendants. After the appeal had been taken by the Government in that case the Brick Company and the Cement Company first learned of the form of the decree, as hereinabove set forth, which prohibited the handling of their products over the Terminal Association. They thereupon sought to intervene in the District Court of the United States for the Eastern Division of the Eastern District of Missouri for the purpose of having the decree modified, in so far as to have it provide that the Terminal Association should be permitted to handle the business of the said Brick Company and Cement Company, and others situated like unto them, when initiating on, transported on and delivered to points located on the line of railway of the Terminal Railroad Association. The District Court permitted the petitions for intervention to be

filed and these will be found on pages 74 and 78 of the record, but refused to grant any relief because the Court had lost jurisdiction to grant relief by reason of the prior appeal of the Government. Thereupon, the Brick Company and the Cement Company applied to this Court at the October Term, 1914, for leave to intervene as original intervenors in this court, refiling the same intervening petitions which had been brought up on the record. This Court granted the application and permitted the Brick Company and Cement Company to intervene in said cause in this court and intervenors participated in the argument at the October Term, 1914. This Court rendered its opinion in said cause on the 23rd day of February, 1915. In its opinion, it said:

> * * * "It may not be disputed that the clause of the first paragraph of the decree, which is in the margin, pointing out the character of the business which the Terminal Company, as reorganized, was authorized to pursue, is susceptible of the construction that the right was excluded to do anything but a terminal business in the narrow sense, and therefore did not permit the company to carry on as ancillary to its terminal business a transportation business, even although originating and terminating on its lines. This being true, we are of opinion, despite the contentions of the United States to the contrary, that the provision in the decree on that subject did not give proper effect to the mandate of this

Court, and should be qualified so as to recognize the right to do, in connection with the terminal business proper, such transportation business as originates and terminates on the lines of the terminal company, for the following reasons: Because not to so decide would lead inevitably to the conclusion that the decision of this Court contemplated safeguarding one public interest by destroying another, and in effect proposed making the movement of transportation freer in some channels by absolutely obstructing all possibility of its flow in others; and moreover, because it assumes that the decision proposed to cure the defects in the organization of the combination which caused it to be in conflict with the Anti-Trust Act by commanding the abstention from the prosecution of business which otherwise under the law there would have been a duty to carry on, thus virtually seeking to remove one cause of illegality in a combination by substituting another."

* * * "As these considerations, in our opinion, demonstrate that the decree should be modified by permitting the carrying on by the company, as incidental to its terminal business, of a transportation business originating exclusively on its own line, moving thereon and terminating thereon, a direction to modify the decree in that respect must necessarily follow."

* * * "It follows from what we have said that the decree below, giving effect to the mandate of this Court, will be modified so as to recognize the right of the terminal company, as an accessory

to its strictly terminal business, to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same, and in other respects the decree will be affirmed." (See United States v. Terminal Railroad Association, 59 Law Edition, l. c. 539, 540 and 541, 236 U. S., l. c. 204, 205, 206, 210.)

The decree entered by the District Court of the United States for the Eastern Division of Eastern District of Missouri, in pursuance to the mandate and decree of this Court, under the decision reported in 59th Law Edition at page 535 (236 U. S. 194), so far as it relates to the questions involved in the intervening petitions of the Brick Company and Cement Company, reads as follows:

"An election having been made to continue the combination for terminal purposes, the defendants are therefore perpetually enjoined from in anywise managing and conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or to its constituents otherwise than as terminal facilities for the railroad companies using the same and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered; provided, always, that the Terminal Railroad Association may, as an accessory to its strictly terminal business, carry

on transportation as to business exclusively originating on its lines, exclusively moving thereon and exclusively intended for delivery on the same." (See Rec., pp. 119, 120 and 121.)

And in the same cause the District Court of the United States for the Eastern Division of the Eastern District of Missouri, on motion of the Brick Company and Cement Company, intervenors, added a clause to the final decree pursuant to the decision of this Court, reported in the 236 U. S. 194 (59th Law Edition, page 535), containing the same provision as has just been cited. (See Rec., pp. 122 and 123.)

BRIEF.

The injunction and judgment rendered against the Terminal Railroad Association in the proceedings brought against it by the Government under the anti-trust acts of the United States was not intended and should not apply so as to prohibit the Terminal Railroad Association from doing a transportation business as an accessory to its strictly terminal business or to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon and exclusively intended for delivery on the same, but such decree should be so drawn as to recognize such right of transportation by the Terminal Railroad Association.

United States v. Terminal Association of St. Louis;

Terminal Railroad Association et al. v. United States;

Re Evens & Howard Fire Brick Company et al. (59 Law Edition, l. c., pp. 539, 540 and 541), 236 U. S., l. c. 204, 205, 206 and 210.

ARGUMENT.

The present proceeding now pending in this court on appeal from the District Court of the United States for the Eastern Division of Missouri is a proceeding initiated by motion in the original case by certain railroads, members of the Terminal Railroad Association, and whose lines terminate on the western bank of the Mississippi River, and is against certain other railroads, members of the Terminal Railroad Association, whose lines terminate on the eastern bank of the Mississippi River. The contest involves the construction and interpretation of the final decree of the District Court of the United States entered in accordance with the mandate and decree of this Court rendered in the case reported in 236 U. S. 194 (59th U. S., page 535), seeking, by this proceeding, to obtain a construction of said decree, so far as it applies to a division of through rates.

We readily concede that on the face of the record the interests of the Brick Company and the Cement Company and others similarly situated do not seem to be directly involved, but neither did they seem to be involved under the original proceeding, nor could anyone conceive that the interests of these parties were or could be in any way affected by the mandate and decree of this Court in the case reported

in 224 U. S. 383 (56 L. ed. 810). The Brick Company and the Cement Company were not parties to that proceeding, nor did they have any warning of the danger to their interests, which might arise in the original proceeding, nevertheless, under the wording of the decree of March, 1914, by the District Court in the original proceeding, the interests of these parties were vitally affected, in fact, if enforced, that decree, as worded, would annihilate the business of these parties. This was due entirely to inadvertence and oversight. There was no information given to this Court, or to the District Court, of the interests and situation of the Brick Company and of the Cement Company and, so, the decree came down, general in terms and destructive of their interests and business. Warned by this result, and realizing that in this immediate proceeding the record is complicated and large; that the briefs will be voluminous; that there is nothing in this particular record to call the Court's attention to the situation of the Brick Company and the Cement Company; feeling that their interests might, by reason of these facts, be overlooked and a decree might be entered now, as heretofore, vitally affecting them, it has seemed to be a wise and proper thing to file this memorandum, clearly advising this Court of what the rights and interests of the Brick Company and the Cement Company are, especially as heretofore fixed by decree of this Court

in 236 U. S. 194 (59 L. Ed. 535), so that they may not suffer a wrong such as was inflicted upon them in the prior proceeding.

Wherefore, we humbly pray that when this case comes to be heard by this Court, it will bear in mind the interests of the Brick Company and the Cement Company and others similarly situated, and that this Court will see that any decree rendered now in this case shall protect the interests of the Brick Company and the Cement Company and any decree rendered shall not preclude the right of the Terminal Railroad Association, as an accessory to its strictly terminal business, to carry on transportation as to business originating exclusively on its lines, exclusively moving thereon and exclusively intended for delivery on the same, but that the right and duty of the Terminal Railroad Association to do and to perform such transportation shall be clearly provided for.

Respectfully submitted,

John F. Lee,

Geo. M. Block,

Amici Curiae.

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the Government. *United States* v. *Terminal Railroad Association*, 215 U. S. 595; *United States* v. *Terminal Railroad Association*, 224 U. S. 383; *Ex parte United States*, 226 U. S. 420; *United States* v. *Terminal Railroad Association*, 236 U. S. 194.

This Court has already sent down four mandates and the end is not yet. The following characterization by the learned counsel for the Terminal Railroad Association indicates their idea of the present status of the proceeding and what the Court and the parties may expect for the future, viz:

> This proceeding is the latest fruit of a litigious tree which was planted a generation ago and has since borne an abundant harvest of distraction and confusion. (Br. 1.)
>
> * * * * *
>
> the Government has long ago dropped out since the public interests are not involved, and the present field of battle is now cleared for the internecine strife between the various proprietary lines which own and control these Terminal properties. (Br. 2).

The original case was commenced under the Sherman Act (Ch. 647, 26 Stat. 209) and for 20 years the several hearings have been conducted before three Circuit Judges under an expediting certificate (Ch. 544, 32 Stat. 823; Ch. 428, 36 Stat. 854).

The present proceeding was instituted by a motion in the District Court by the West Side Lines [1]

[1] For brevity and convenience the appellee carriers will be referred to as the "West Side Lines." The Terminal Railroad Association will be referred to as "Terminal." The other appellant carriers wil be referred to as the "East Side Lines."

(Tr. 124) for a rule to show cause why the Terminal and the East Side Lines should not be punished for contempt of the injunctive orders and decree of the District Court (Tr. 149) which were entered on the mandates of this Court. (Tr. 119, 120, 121, 122, 123; 224 U. S. 383; 236 U. S. 194.)

In the District Court the Government did not participate in the proceeding for contempt and took no action with respect thereto. Likewise, in answer to a communication dated November 18, 1920 (Tr. 490), the Interstate Commerce Commission, under date of November 26, 1920, writing by Chairman E. E. Clark, declined to take action with respect to "questions of tariff construction and application which under ordinary circumstances we would feel obliged to raise in connection with the attempt made by the M., K. & T., the Frisco, the Missouri Pacific, and the Rock Island to conform their participation in tariffs to what they believe to be the decree of the court, but inasmuch as this matter is before the court * * * we shall, for the present at least, withhold challenge to your tariffs." (Tr. 492.) On July 24, 1915, the Commission, through its secretary, also advised the traffic manager of the Terminal Association, "Responsibility for strict conformance with the decree of the court rests upon your company, and it must determine for itself what action may or may not be taken under such decree." (Tr. 338.)

The decree of the District Court appealed from adjudges the Terminal and the East Side Lines continuously in contempt of the court by violating the

Terminal Railroad Association, 224 U. S. 383. Paragraph 1 of that decree, with the italicized lines added as a result of the mandate in *United States* v. *Terminal Railroad Association*, 236 U. S. 194, is as follows (Tr. 123):

> 1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Antitrust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing, and the like, and modifying its contracts as herein specified. An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered. *Pro-*

vided, however, that the right of said Terminal Railroad Association as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same is hereby recognized, and nothing in this decree shall be construed to deny such right.

The remaining pertinent paragraphs dated January 29, 1914, and filed March 2, 1914 (Tr. 119), are as follows (Tr. 122):

3. Hereafter traffic destined to St. Louis, Missouri, or to points west of the Mississippi River and to be transported through the St. Louis gateway or traffic from St. Louis, Missouri, destined to points east of said river, shall not be billed to East St. Louis, Illinois, or other junction points or termini of the railroads of any of the said railroad companies east of the river and then rebilled to destination, but for all such traffic each railroad company shall issue through bills of lading unless otherwise directed by the person controlling the same. The defendants are perpetually enjoined from violating the above provisions.

4. The defendants are perpetually enjoined from making any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

5. The provisions of this decree shall extend to and embrace all railroad companies now or hereafter admitted to joint ownership or use of the facilities of the Terminal Railroad Association and to its facilities present and future acquired.

6. Nothing in this decree shall be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.

The single question is whether the Terminal and the East Side Lines are violating the decree of the District Court. The middle of the case may quickly be reached by a reference to undisputed facts found in the opinions of the learned Circuit Judges sitting in the District Court.

Circuit Judges Sanborn, Carland, and Stone sat at the first hearing (Tr. 494). Judge Carland wrote the opinion. After reviewing the procedure and overruling motion to dismiss, he stated the basis of the controversy to be "that if the Terminal is allowed, in violation of the decree, to operate as a railroad transportation company and not as a terminal, it will be possible for it, by reason of what are called the east-side lines of railroad, * * * to compel the west-side lines, * * * to pay the transfer charges of the Terminal both ways across the Mississippi River, amounting in the case of one of the petitioners

to five hundred thousand dollars per annum." (Tr. 496.)

After observing that the Terminal, prior to the institution of the original suit and prior to the decree, was operated as an independent carrier between the East Side and West Side lines was settled by the decree, that the Terminal has been so operated at all times since was either admitted or shown by the evidence; and that, acting as a railroad company, and not as a terminal company, was the only ground on which the Terminal was declared an unlawful combination, Judge Carland said (Tr. 497):

> The evidence and admissions of counsel show that the Terminal, in addition to doing a terminal business proper, and in addition to transporting as an accessory to their strictly terminal business traffic exclusively originating, moving, and having its destination upon the lines of the same, has at all times continued as before the entering of the final decree, and still continues to engage in the general railroad transportation business as an intermediate common carrier, as an initial common carrier, and as a delivering common carrier, and has made no changes whatever in its previous custom in that respect; that said Terminal is now, and ever since the entering of said final decree has been, engaged in the transportation, as a railroad common carrier and as a railroad transportation company, of every class of traffic, whether east or west bound, and whether coming to them from points beyond their terminals and delivered to

them by proprietary as well as by other railway companies, as well as all classes of traffic having origin in East St. Louis and whether upon its terminals or upon the terminals and rails of the same, of the proprietary and other railroad companies when destined to St. Louis, Missouri, or points beyond St. Louis, as well as traffic of every character originating in St. Louis, Missouri, and whether upon its own terminals or the terminals and rails of the proprietary companies or some other railway company in St. Louis, Missouri, for shipment to East St. Louis, as well as all such traffic destined to points beyond East St. Louis; that the Terminal continues to interpose itself as a transportation company between the railroads whose own rails terminate on opposite sides of the Mississippi River and between the city itself and the roads terminating on the east side of the river; that the Terminal is not acting in good faith as the impartial agent of the various proprietary lines; that the tracks, bridges, and other terminal facilities of the Terminal have not at any time been, and are not now being, used by the proprietary companies other than the petitioners, as extensions of their railroads; that the Terminal has not abandoned all or any operating methods and charges as and for railroad transportation, and has not at any time, and is not now, confining itself to the transportation of terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and assisting in the collection and distribution

of traffic for the carrier companies, switching, storing, and the like; that the Terminal is now, and it has been at all times in the past, a party to innumerable tariffs, through concurrence therein and the filing of division sheets, whereby it participates as a common carrier and as a general railroad transportation company in the rates on all business so received and handled; that the east-side lines, having control of the Terminal, compel the west-side lines to pay the Terminal its transfer charges for supplying and operating facilities for the interchange of both through eastbound and through westbound freight traffic between the east-side lines and the west-side lines.

Accordingly, as a conclusion of law from the facts which were found the court held that the Terminal had acted in the premises in violation of the order and decree of the court; it was further ordered that the decree should be made more specific by (Tr. 498)—

1. Requiring the east-side lines to pay the reasonable transfer charges of the Terminal on westbound through freight to the rails of the west side lines;

2. Requiring the Terminal to cease and desist from issuing bills of lading or receipts taking the place of bills of lading, or issuing passes usable by passengers riding on through tickets from points on its lines to distant points beyond its lines;

3. Requiring the Terminal to cease and desist from becoming a party to tariffs through concurrences therein and the filing of division sheets;

4. These things to be done within sixty days from the date of the order;

5. Upon proof of noncompliance with the order, the appointment of a receiver and dissolution of the Terminal to be considered.

The three Circuit Judges stood unanimous except on the third requirement as to which Judge Sanborn alone dissented.

Subsequently, and before further action, Judge Carland died. The case was then called for further hearing before Circuit Judges Sanborn, Stone, and Lewis (Tr. 501). On resubmission Circuit Judge Lewis announced that on the previous hearing it was the unanimous conclusion of the three judges then sitting that respondents should be held as in civil contempt; that there was but a single difference between those judges in that Judges Carland and Stone had concurred and Judge Sanborn had dissented on the terms of the sixth paragraph of the decree. Circuit Judge Lewis then concurred in the previous limited dissent of Judge Sanborn. Judge Stone then recorded his dissent from the conclusions reached by the concurrence of Judges Sanborn and Lewis on paragraph 6. In a very carefully prepared opinion expounding the decree Circuit Judge Stone said (Tr. 508):

> Every reference in the decree and opinions to the methods, past and future, of operation (with the exception of the "arbitrary") were intended to effectuate and secure this definitely stated limitation in the character of future

operation. The terminal was declared to be unlawful if operated as a transportation line and to be lawful if operated purely and solely as terminal property. In the decree itself is the definition intended by the court of terminal operation. That definition is amplified in the opinions. The decree definition is "such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing, and the like." This definition relates not merely, nor in fact at all, to the physical acts of terminal service, since those must necessarily remain the same as before but it referred to methods of charging, billing, and the like. This is proven by the requirements that it should abandon "all operating methods and charges as and for railroad transportation;" that the defendants were enjoined "from in anywise managing or conducting * * * and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered;" that rebilling at East St. Louis was enjoined; and that through billing was required. The intent, purpose, and effect of the decree was to permit the combination to continue solely as the terminals of the carriers desiring to use the same. The decree covered all manner of operation, business, or charges which were different in a terminal property of a carrier

and in the outside of terminal haul or transportation business of the carrier. Those differences exist, practically speaking, in participations in and division of charges and tariffs of the regular using carrier and in issuance, as a separate carrier, of bills of lading and billing of freight passing off or coming onto its tracks.

It is true that the Interstate Commerce Acts give the Commission jurisdiction over terminal as well as regular transportation in respect to charges and methods of billing, but the Antitrust Act is fully applicable to railroads. The courts have jurisdiction, under the Antitrust Act, to declare that a combination of carriers, as to certain facilities, can not continue if they employ in connection therewith the methods of billing and manner of charging used by them in ordinary transportation. The Commission has nothing to do with that and certainly can not nullify such action of the court. The court decrees that this shall be a purely terminal association in all respects, including tariffs, charges, and methods of billing. The jurisdiction of the Commission attaches to determining the methods and charges within the scope or limits herein defined by the Supreme Court. That was the entire scope of the provision, in the decree, concerning the Commission. If the Association, any of its constituents, or any of the carriers using its facilities step outside the limits of the decree, the sanction by the Commission of the forbidden acts affords no shield or excuse to enforcement of the decree.

> The decree and the opinions are positive upon another point. That is, that the terminal shall be the agent of each of the using roads, impartially as to service and charges.

The four Circuit Judges stood united, therefore, on the whole of the decree appealed from, except that they stood equally divided on the following paragraph (Tr. 511):

> (*d*) In that the said Terminal Railroad Association has been issuing bills of lading or receipts taking the place of bills of lading usable for the transportation of through freight from points on its lines to distant points beyond its lines, and has been issuing passes usable by passengers riding on passes or tickets from points on its lines to distant points beyond its lines.

Here are four Circuit Judges of wide experience who concurred after two hearings that the Terminal and the East Side Lines stand in contempt of their decrees entered on the mandates of this court. The Terminal and the East Side Lines are fortunate that the Judges did not order complete dissolution of their relations which they were using not only to flout the Sherman Act but also judicial power to control them.

Opposing counsel would seem to contend that paragraph 6 of the decree authorized them to bring about a situation more destructive and disastrous to the public interest and the terminal situation in St. Louis than ever existed prior to the filing of the original bill and the announcement of the opinions

> it into execution, according to the mandate. That court can not vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

That the Transportation Act has not repealed the Sherman Act as applicable to combinations of railroad companies is obvious from the late case of *United States* v. *Southern Pacific Co.*, 259 U. S. 214, which was argued and decided May, 1922, more than two years after the Transportation Act was passed. It does not appear from the opinion of Mr. Justice Day that any of the distinguished counsel in that case ever suggested that the Transportation Act had repealed or in any manner superseded the Sherman Act.

True paragraph (8) of Section 407 which amends the first paragraph of Section 5 of the Interstate Commerce Act provides (Ch. 91, 41 Stat. 482):

> The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "anti-trust laws," * * * and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required *by any order made under and pursuant to the foregoing provisions of this section.*

It is not claimed that any order has been made by the Commission or applied for under Section 407. It will be time enough to consider such a question if, as, and when it arises. See *Control of Big Four by New York Central*, 72 I. C. C. 96, 98; *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508; *Control of Lake Erie & Western by Nickel Plate*, 72 I. C. C. 459.

If the Terminal and the East Side Lines prevail in their contention that the Transportation Act has "abated this whole litigation"; in other words, if in five appeals covering a period of 20 years the court, counsel, and litigants have all simply spent their time in beating the air, then the case so comes to an end. On the other hand, if the whole litigation has not abated, but the 20 years of effort have simply been made fruitless by the continued contempt of the Terminal and the East Side Lines, there then arises the question whether the Terminal Association should not be dissolved *in toto* in pursuance of the opinions of this Court and the decrees entered on its mandates, reference to which appears in the opinion of Judge Carland. (*Ante*, 12.)

On motion of the Government or on its own motion this Court has the power to direct that the Terminal Association shall be dissolved. In *Continental Insurance Company* v. *United States*, 259 U. S. 156, 166, Mr. Chief Justice Taft, speaking for the Court, said:

> We delegated to the District Court the duty of formulating a decree in compliance

with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion.

III.

CONCLUSION.

The "litigious tree which was planted a generation ago and has since borne an abundant harvest of distraction and confusion" should not only be cut down but its roots should be destroyed. Only dissolution of the Terminal will accomplish that result. The affirmance of the decree will require that the Terminal and the East Side Lines shall pay to the West Side Lines the losses which the latter have sustained by reason of the contempt. If the decree of the District Court is inadequate to control the Terminal and the East Side Lines, then a complete dissolution decree should be entered.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 115. Argued March 3, 4, 1924.—Decided October 13, 1924.

1. Certain railway companies, defendants in a suit successfully prosecuted by the United States under the Sherman Law, instituted contempt proceedings against their codefendants, not to vindicate the authority of the court, but to enforce rights which the petitioners claimed under the original decree and alleged that the respondents were violating. The United States did not join in the complaint or participate in the hearing in the District Court, but aligned itself with the petitioners on appeal. *Held*, that the con-

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than he told of; that he had caught him in several contradictory statements and witness said: 'We are all firmly of the belief that you know who killed those men'; sat and watched him and looked at him carefully and for a long time after I would tell him those things and would say, 'Now, you think it over,' and stayed right there with him.

"Q. Your purpose in telling him those things was to make him talk?

"A. My purpose was to get him to tell me the truth about this case.

"Q. Answer the question, will you?

"A. Well, he had to talk."

". . . Practically every admission he made was in answer to question witness asked himself; 'had gotten practically everything that I thought was important,' and left the details to Burlingame and Kelly."

[*] Compare *Boyd* v. *United States*, 116 U. S. 616, 631; *Weeks* v. *United States*, 232 U. S. 383, 398; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392; *Gouled* v. *United States*, 255 U. S. 298; *Amos* v. *United States*, 255 U. S. 313, 316; *Bilokumsky* v. *Tod*, 263 U. S. 149, 155; and "Progress of the Law, 1921–1922, Evidence," [Chafee] 35 Harv. L. Rev. 428, 439.

tempt proceedings were civil and remedial, and not criminal. P. 27.

2. The authority of a justice of this Court to allow appeals and grant supersedeas does not depend upon and is not limited by Rule 36, or any other rule of the Court. It includes appeals under the Expedition Act of February 11, 1903, c. 544, 32 Stat. 823, Rev. Stats., §§ 999, 1012. P. 28.
3. Upon an appeal by parties adjudged in contempt of a decree, where the question is whether the decree was broad enough to forbid the conduct complained of, appellees cannot be heard to claim that the decree should have been enlarged unless they took a cross appeal. *Id.*
4. In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read. P. 29.
5. The making of railroad rates is a legislative and not a judicial function; and as a general rule the question of the reasonableness of rates of interstate carriers or of their divisions of joint rates will not be considered by the courts before application has been made to the Interstate Commerce Commission. P. 30.
6. The original decree in this case, (a suit by the United States against the Terminal Association, its subsidiaries and the proprietary railroads owning its stock, to prevent monopoly and restraint of trade in violation of the Sherman Act, *United States* v. *St. Louis Terminal*, 236 U. S. 194,) does not regulate rates, or prescribe divisions of joint rates or fix liability for transfer charges; and expressly provides that these matters may be dealt with by the Interstate Commerce Commission. P. 31.
7. Therefore, contempt proceedings will not lie to determine whether the "west side" proprietary railroads have paid more than their fair share of charges for services of the Terminal Association or to require the "east side" proprietary railroads to make payments on that account to the "west side" railroads; and refusal to pay such charges is not contempt of court. *Id.*
8. Assuming that the issuing by the Terminal Association of bills of lading and passes from points on its lines to distant points beyond them is not included in the business allowed under the original decree, proprietary railroads not shown to have been injured by it are not entitled to relief against it in contempt proceedings. P. 32.

Reversed.

APPEAL from an order of the District Court adjudging appellants guilty of contempt, committed by disobeying a decree.

Mr. R. V. Fletcher and *Mr. T. M. Pierce*, with whom *Mr. L. J. Hackney, Mr. Alex. P. Humphrey, Mr. Morison R. Waite, Mr. T. W. White, Mr. D. P. Williams* and *Mr. J. L. Howell* were on the briefs, for appellants.

Mr. Joseph M. Bryson and *Mr. Edward J. White*, with whom *Mr. William F. Evans, Mr. William F. Dickinson, Mr. Charles S. Burg* and *Mr. Edward T. Miller* were on the brief, for Missouri, Kansas & Texas Railway Company et al., appellees.

I. The order adjudging contempt and prescribing the means and method whereby it may be purged in no manner invades the jurisdiction of the Interstate Commerce Commission, but is the proper exercise by the court of its right and duty to protect its decree. Cf. *Fischer* v. *Hayes*, 6 Fed. 63; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399. The District Court found that the Association was not acting in good faith as the impartial agent of the various railroad companies; that this condition was brought about by the domination of the Association by the east side lines, and its acquiescence therein; that by reason of such domination the east side lines compelled the west side lines to pay the Association's charges for supplying and operating facilities for interchange of certain traffic; and it held that the natural and proper punishment to be inflicted was a refund to the west side lines of the amounts they had been thus unlawfully required to pay. That procedure is strictly judicial, and is not only not a proper subject for consideration by the Interstate Commerce Commission but is a matter over which it has no jurisdiction.

Another finding deals with the action of the Association in issuing bills of lading for transportation of through

freight from points on its lines to points beyond its lines, and the use of passes by passengers between such points. It was impossible from the record to escape the conclusion that the Association was guilty of this practice after the decree the same as before.

Subdivision (a) of par. 3 of the order does not attempt to specify all the acts of the Association upon which was based the conclusion that it was not acting in good faith as the impartial agent of the various railroad companies. Subdivisions (b), (c) and (d) deal with particular instances reflecting such violation, but recourse can be had to the various opinions in this case, particularly the unanimous findings of the four circuit judges, for ascertaining other particulars evidencing such partiality.

The east side lines contend that the question to be determined by this Court is, whether there is anything in this proceeding or in law to warrant the court of first instance to determine what shall be the tariffs of the east side lines, or what shall be the division between the east side lines and the west side lines of rates on traffic passing from East St. Louis through St. Louis to points beyond. The District Court did not attempt to fix rates or divisions, nor did it assert that it had any authority to do so. It did, however, assert its lawful authority to forbid the east side lines, through their domination of the Association, from requiring the west side lines to pay more than their share of the expense of furnishing and operating the terminal facilities, the evidence showing that the west side lines had been forced to pay all the Association's charges for furnishing and operating facilities for the transfer of through freight both eastbound and westbound. The order did not specify any revision in tariffs; on the contrary, the opinion upon which the order is based in terms declares that the tariff questions are within the jurisdiction of the Interstate Commerce Commission. *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, distinguished.

II. The jurisdiction of the courts was not ousted by Transportation Act, 1920.

III. The west side lines had not only the right, but for self protection were under duty, to institute this contempt proceeding. One of the basic purposes of the Anti-Trust Act is to protect, not to destroy, rights of property. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78.

It is fundamental that a contempt proceeding where the relief sought is civil and remedial, is not a criminal proceeding in the sense that the criminal element dominates the case. A proceeding of this nature is between the original parties and is instituted and tried as a part of the main case. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418. The penalty assessed against the contemnors may be ordered paid to another party to the suit for damages it may have suffered as a result of the contemptuous violation of the decree. *Morehouse* v. *Giant Powder Co.*, 206 Fed. 24; *Merchants' Stock & Grain Co.* v. *Board of Trade*, 201 Fed. 20; *Kreplik* v. *Couch Patents Co.*, 190 Fed. 565; *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *In re North Bloomfield Gravel Min. Co.*, 27 Fed. 795; *Wells, Fargo & Co.* v. *Oregon Ry. & Nav. Co.*, 19 Fed. 23; *Secor* v. *Singleton*, 35 Fed. 378; *Matter of Christensen Engineering Co.*, 194 U. S. 458; *Cary Mfg. Co.* v. *Acme Flexible Clasp Co.*, 187 U. S. 427. Contempt proceedings may be instituted in the main cause by motion. *Phillips Co.* v. *Amalgamated Assn.*, 208 Fed. 335.

IV. The only question involved on this appeal is the jurisdiction of the District Court as a federal court. That jurisdiction being conceded, the judgment should be affirmed.

V. The effect of the operating agreement, the various opinions in this cause and the final decree, is to constitute the rails of the Association extensions of the rails of the proprietary companies.

Mr. Solicitor General Beck and *Mr. Blackburn Esterline*, Assistant to the Solicitor General, for the United States, submitted.

Opposing counsel would seem to contend that paragraph 6 of the decree authorized them to bring about a situation more destructive and disastrous to the public interest and the terminal situation in St. Louis than ever existed prior to the filing of the original bill and the announcement of the opinions and decrees of this Court; that, in adjudging the Association a combination and conspiracy in restraint of trade and commerce under the Sherman Act, the Court has authorized them to engage in other activities which place them not only beyond the Sherman Act but to far greater advantage than if the original bill in equity had never been filed.

The argument that anything contained in Transportation Act, 1920, "abated this whole litigation" need not seriously be considered.

That the Transportation Act has not repealed the Sherman Act as applicable to combinations of railroad companies is obvious from the late case of *United States* v. *Southern Pacific Co.*, 259 U. S. 214, which was argued and decided more than two years after the Transportation Act was passed.

Paragraph 8 of § 407, is irrelevant, since it is not claimed that any order has been made by the Commission or applied for under § 407.

Should not the Association be dissolved *in toto* in pursuance of the opinions of this Court and the decrees entered on its mandates? On motion of the Government, or on its own motion, this Court has the power to require it. *Continental Ins. Co.* v. *United States*, 259 U. S. 156.

Mr. John F. Lee and *Mr. George M. Block*, by leave of Court, filed a brief as *amici curiae*.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In November, 1905, the United States filed complaint in the Circuit, now District, Court for the Eastern District of Missouri against the Terminal Railroad Association of St. Louis, two bridge companies and a ferry company, subsidiaries of the Association, certain railroad companies which owned the capital stock of the Association, and the individuals who represented the shareholders on the Board of Directors of the Association. The names of the defendants are given in a note printed in the margin of the opinion in *United States* v. *St. Louis Terminal*, 224 U. S. 383, 390. The complaint alleged a combination in violation of the Sherman Anti-Trust Act, c. 647, 26 Stat. 209, and prayed a dissolution of the Association. Under the Expedition Act of February 11, 1903, c. 544, 32 Stat. 823, four Circuit Judges heard the case and entered a decree dismissing the complaint. On appeal to this court, there was a reversal. The case was remanded, and, March 2, 1914, a final decree was entered in the District Court in favor of the United States, in accordance with the mandate of this court. *United States* v. *St. Louis Terminal*, *supra*, 411. See also *Ex parte United States*, 226 U. S. 420. There was another appeal (236 U. S. 194) and, February 7, 1917, the District Court modified its decree in accordance with the direction of this court. The substance of the decree, as modified, so far as here material, is as follows:

"1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and con-

fining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing and the like, and modifying its contracts as herein specified. An election having been made to continue the combination for terminal purposes, the defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered. Provided, however, that the right of said Terminal Railroad Association as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same is hereby recognized, and nothing in this decree shall be construed to deny such rights."

Paragraph 2 of the decree directs a reorganization of the contracts between the defendant railroad companies and the Terminal Association by providing for the admission of any railroad to joint ownership and control of the combined terminal properties on terms of equality with the then proprietary companies, and for the use of the terminal facilities by any railroad not a joint owner upon such terms as will, in respect of use, character and cost of service, place every such railroad upon as nearly an equal plane as may be, with respect to expenses and charges, as that occupied by proprietary companies, and by eliminating from the existing agreement any provision which restricts any proprietary company to the use of the facilities of the Terminal Association.

Paragraph 3 abolishes the practice of billing to East St. Louis or other junction points and then rebilling traffic destined to St. Louis or points beyond.

Paragraph 4 abolishes any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area that is not equally applied in respect of traffic originating outside of that area.

Paragraph 5 extends the effect of the decree to all railroad companies thereafter admitted to ownership or use of the terminal facilities.

Paragraph 6 is as follows: "Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission."

The cause was reserved for such further orders and decrees as might be deemed necessary.

Certain defendant railroad companies, for convenience, are called the west side lines.[1] Certain others are called the east side lines.[2] The Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company each has a line which enters St. Louis from the east and a line which enters it from the west, but they are aligned with the east side lines on this appeal. The capital stock

[1] Missouri, Kansas & Texas Railway Company; St. Louis-San Francisco Railway Company; Missouri Pacific Railroad Company, and the Chicago, Rock Island & Pacific Railway Company.

[2] Baltimore & Ohio Southwestern Railroad Company; Chicago & Alton Railroad Company; Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Illinois Central Railroad Company; Louisville & Nashville Railroad Company; Southern Railway Company; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; St. Louis Southwestern Railway Company; Chicago, Burlington & Quincy Railroad Company, and the Wabash Railway Company.

of the Association is owned in equal amounts by all these companies, and they are called proprietary companies.

In August, 1920, the west side lines filed a petition and motion in the District Court to have the Terminal Association and its subsidiaries, and the east side lines and also their representatives on the Board of Directors of the Terminal Association adjudged guilty of contempt of court for violating the decree. The parties so complained of (appellants here) appeared and moved to dismiss the petition and also filed answer. An examiner was appointed, and, after the taking of evidence and a hearing, the court denied the motion to dismiss and entered its decree that the appellants "have continuously since the entry of said final order and decree, in contempt of this court, violated the terms thereof and are still violating its said terms—

"(a) In that defendants, the Terminal Railroad Association of St. Louis and its subsidiary companies are not acting in good faith as the impartial agents of the various proprietary lines.

"(b) In that the proprietary lines other than the petitioners, through the domination and control of the Board of Directors of defendant, the Terminal Railroad Association of St. Louis and its subsidiaries, compelled the petitioners to pay the Terminal Railroad Association its transfer charges for supplying and operating facilities for the interchange of both through east bound and through west bound freight traffic between the east side lines and the west side lines.

"(c) In that the defendants [the east side lines above named] . . . have not paid and are not now paying the reasonable transfer charges of defendant, the Terminal Railroad Association of St. Louis and its subsidiary companies on west bound through freight to the rails" of the petitioners and other defendants whose lines enter St. Louis from the West.

"(d) In that the said Terminal Railroad Association has been issuing bills of lading or receipts taking the place of bills of lading usable for the transportation of through freight from points on its lines to distant points beyond its lines, and has been issuing passes usable by passengers riding on passes or tickets from points on its lines to distant points beyond its lines."

And the decree commands that within 60 days the appellant companies cease violating the final decree in the respects above set forth, and that the east side lines "be and they are hereby required to pay within 60 days after the amount of same shall have been ascertained and determined for the use and benefit of said west side lines . . . the total amount of the transfer charges of defendant Terminal Railroad Association of St. Louis and its subsidiary companies paid by said west side lines on west bound through freight of said east side lines to the rails of said west side lines at St. Louis, Missouri; from the date of the entry of said final decree, to wit; March 2, 1914, to the date of this order. . . ." And the decree prescribed and directed how such total amount should be determined.

In these proceedings, the United States did not join in the complaint or participate in the hearing in the District Court, but has since appeared and is aligned with the appellees. The proceedings were instituted by the west side lines, not to vindicate the authority of the court, but to enforce rights claimed by them under the original decree. The controversy is between them and the east side lines as to whether the former or the latter shall bear transfer charges on west bound through freight. The nature of the proceedings is civil and remedial, not criminal. See *In re Nevitt*, 117 Fed. 448, 458; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441, *et seq.*; *Re Merchants' Stock Co., Petitioner*, 223 U. S. 639; *Morehouse* v. *Giant*

Powder Co., 206 Fed. 24; *Merchants' Stock & Grain Co.* v. *Board of Trade*, 201 Fed. 20, 23.

This appeal was taken under the Expedition Act of February 11, 1903, c. 544, 32 Stat. 823. Appellants applied to the Circuit Judges for allowance of appeal and supersedeas. The appeal was allowed and supersedeas was granted on condition, among others, that, commencing 60 days after the entry of the decree, the east side lines pay to the Terminal Association and its subsidiaries charges for transferring westbound through freight from the east side lines to the rails of the west side lines. Appellants, being unwilling to accept that burden, applied to a justice of this court, who allowed their appeal and, upon the giving of appropriate security, granted supersedeas without requiring such payments to be made pending the appeal. Appellees assert that the allowance of the appeal was under Rule 36 which provides that an appeal from a District Court may be allowed and supersedeas granted by a justice of this court, in cases provided for in §§ 238 and 252 of the Judicial Code; that thereby the case was brought under § 238, and that the question of jurisdiction is all that may be considered on this appeal. The contention is without merit. The authority of a justice of this court to allow appeals and grant supersedeas does not depend upon and is not limited by Rule 36 or any other rule of this court. See *Hudson* v. *Parker*, 156 U. S. 277, 284. The Expedition Act gives the right of appeal in this case, and the appeal was properly allowed by a justice of this court. Revised Statutes, §§ 999, 1012. *Sage* v. *Railroad Co.*, 96 U. S. 712, 715; *Brown* v. *McConnell*, 124 U. S. 489.

The original decree was not enlarged by the decree appealed from. And, as there is no cross appeal, no question is presented as to the right of the appellees to have it amended so as to impose any additional condition on the continued existence of the combination as unified ter-

minal facilities. *Peoria Ry. Co.* v. *United States,* 263 U. S. 528, 536. The question whether the east side lines are bound to pay transfer charges on west bound through freight depends upon the proper construction and application of the original decree.

In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read. See *United States* v. *Atchison, T. & S. F. Ry. Co.,* 142 Fed. 176, 182, 183; *In re Cary,* 10 Fed. 622, 625, 626; *Ophir Creek Water Co.* v. *Ophir Hill Mining Co.,* 61 Utah, 551, 556; *Louisville & Nashville R. R. Co.* v. *Miller,* 112 Ky. 464, 472; *Wisconsin Central R. R. Co.* v. *Smith,* 52 Wis. 140, 143; *Sullivan* v. *Jones & Laughlin Steel Co.,* 222 Pa. St. 72, 85, 86; *Weston* v. *Lumber Co.,* 158 N. C. 270, 273; *Deming* v. *Bradstreet,* 85 Conn. 650, 658; *Porous Plaster Co.* v. *Seabury,* 1 N. Y. S. 134. The statement of the decree appealed from [subdivision (a)] that the Terminal Association and its subsidiaries are not acting in good faith as the impartial agents of the various proprietary lines is too general and vague, when considered by itself, to constitute a specification of facts amounting to contempt of court. The meaning and application of this general language is to be limited by the specification of details which follow it in (b) and (c) of the same section. *Atkins* v. *Disintegrating Co.,* 18 Wall. 272, 302; *Bock* v. *Perkins,* 139 U. S. 628, 634, 635; *Brunson* v. *Carter Oil Co.,* 259 Fed. 656, 664.

The original decree does not require the east side lines to pay the charges for transferring west bound through freight. No provision so directs, and there is nothing in the circumstances to indicate that the court intended to prescribe the amount of such transfer charges or to fix liability therefor. *United States* v. *St. Louis Terminal,*

236 U. S. 194, 204. The suit was brought by the United States to prevent restraint of trade and monopoly in violation of the Sherman Anti-Trust Act. It did not relate to the transfer charges or division of joint rates. All the proprietary companies were defendants. The pleadings presented no issue between the west side lines and the east side lines; and no controversy between them was determined by the decree.

The practice of "breaking" the rates on west bound through freight at the east bank of the Mississippi River in East St. Louis has prevailed since 1877. That is, joint rates on freight moving from the east through St. Louis to points in the west have been considered as made up of an amount to cover the haul to the east bank of the river and an amount to cover the haul beyond that point. The former has been divided among the carriers hauling to the east bank of the river; the balance among those hauling from that point,—including the Terminal Association and its subsidiaries making the transfer from the lines on the east to the lines on the west side of the river. It has also been the practice at this crossing to "break" the joint rates on east bound through freight at the same place. All rates have been set forth by tariffs; and the divisions of the charges among the participating carriers have been shown by their division sheets filed with the Interstate Commerce Commission. The practice has been the same on all competing routes crossing the river at points between East St. Louis and Dubuque.

The making of rates is a legislative and not a judicial function. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440; *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 305; *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474, 483; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226. The division of joint rates is also legislative in character. The Interstate

Commerce Commission is authorized to establish through routes and joint rates and to prescribe conditions upon which such routes shall be operated, and to fix divisions of such rates among carriers. § 15 (1), (3), (6), Interstate Commerce Act, § 418, c. 91, 41 Stat. 485, 486. It is well settled as a general rule that the question of the reasonableness of rates or of divisions of joint rates will not be considered by the courts before application has been made to the Commission. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Robinson* v. *Baltimore & Ohio R. R.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 254–261; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. The Terminal Association and its subsidiaries are common carriers by railroad and, like the proprietary companies, are subject to regulation by the Commission. The original decree does not purport to regulate rates or prescribe divisions of joint rates, or fix liability for such transfer charges. On the other hand, it expressly provides that it shall not affect in any wise or at any time the power of the Commission over charges to be made by the Terminal Association or its subsidiaries, or any power conferred by law upon the Commission. In the exercise of its powers under existing law, the Commission is untrammeled by the decree and may make and regulate rates on through freight and the divisions thereof. As the original decree does not prescribe charges or fix divisions of joint rates, contempt proceedings will not lie to determine whether the west side lines have paid more than their fair share of the charges for the services rendered by the Terminal Association, or to require the east side lines to make the payments specified in the decree appealed from. The refusal or failure of the east side lines to pay the charges in controversy or any other transfer charges is not contempt of court.

The issuing of the bills of lading, receipts and passes referred to in the decree [subdivision (d)] appealed from is not expressly forbidden by the original decree. But assuming in favor of the west side lines that such issuing is not included in the terminal business which the combination is permitted to do, it is not shown that any injury to them has resulted therefrom, or that they are entitled to any relief. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, 451.

Decree reversed.